TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~1129~~. 725 409 125

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED), APPELLANT,

vs.

ROBERT K. DOW, WATSON MATTHEWS, AND CHARLES MORAN, TRUSTEES.

FILED OCTOBER 18, 1884.

No. ~~1184~~. 772 451 165

ROBERT K. DOW, WATSON MATTHEWS, AND CHARLES MORAN, TRUSTEES, APPELLANTS,

vs.

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED.)

FILED OCTOBER 30, 1884.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1120.

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED), APPELLANT,

vs.

ROBERT K. DOW, WATSON MATTHEWS, AND CHARLES MORAN, TRUSTEES.

FILED OCTOBER 18, 1884.

No. 1184.

ROBERT K. DOW, WATSON MATTHEWS, AND CHARLES MORAN, TRUSTEES, APPELLANTS,

vs.

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED.)

FILED OCTOBER 30, 1884.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

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1 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Be it remembered that on the 27th day of February, 1884, came into the office of the clerk of the circuit court of the United States for the eastern district of Arkansas R. K. Dow, Watson Matthews, and Charles Moran, by U. M. & G. B. Rose, their solicitors, and filed therein their bill of complaint against the Memphis and Little Rock Railroad Company, as reorganized, which bill of complaint is as follows:

2 *Printed Copy of Bill.*

In the United States Circuit Court for the Eastern District of Arkansas.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized), Defendant.

Original Bill.

Filed Feb. 27, 1884. RALPH L. GOODRICH, *Clerk.*

3 *Original Bill.*

In the United States Circuit Court for the Eastern District of Arkansas.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized), Defendant.

To the judges of said court in chancery sitting:

Your orators, Robert K. Dow, who is a citizen of the State of New Hampshire, Watson Matthews, who is a citizen of the State of New Jersey, and Charles Moran, who is a citizen of the State of New York, bring this their bill of complaint against the Memphis and Little Rock Railroad Company (as reorganized); which is a corporation created by the laws of the State of Arkansas, and organized thereunder, and respectfully show, as follows:

That the Memphis and Little Rock Railroad Company was a corporation created by an act of the General Assembly of the
4 State of Arkansas, entitled "An act to incorporate the Memphis and Little Rock Railroad Company," approved January 11, 1853, the object and aim of said corporation being to build a railroad between the city of Memphis, in the State of Tennessee, and Little Rock, in the State of Arkansas, power being thereby given to said company to borrow money for the purpose of building and equipping said road on the credit of the company, and on the mortgage of its charter and works; all which will be seen by a copy

of said act herewith filed, marked Exhibit A, and made part hereof.

That in order to build and equip the proposed road aforesaid the said Memphis and Little Rock Railroad Company borrowed money, and to secure the same issued, on the first day of May, 1860, thirteen hundred bonds of that date, each being for the sum of one thousand dollars, payable on the first day of May, 1890, to bearer, with interest at the rate of eight per centum per annum, payable semi-annually, and that in order to secure the payment of said bonds the said Memphis and Little Rock Railroad Company did, on the first day of May, 1860, execute its certain deed of trust, or mortgage, to Sam Tate, Robert C. Brinkley and George C. Watkins, whereby it conveyed to them the said road, its road-bed, right of way, and all works or rolling stock of or belonging to said company, together with the charter by which said company was incorporated and under which it was organized, and all the rights, privileges, and franchises thereof, and also all the land lying in the State of Arkansas granted to the said Memphis and Little Rock Railroad Company by the State of Arkansas, upon condition
5 that if said bonds and the interest thereon should be paid according to their tenor and effect, then said conveyance should be void, which mortgage was duly recorded in the several counties in which said company owned any of said property before the tenth day of January, 1861, on which day the said Memphis and Little Rock Railroad Company borrowed from the State of Arkansas the sum of one hundred thousand dollars, agreeing to repay the same ten years after that date, with interest thereon from said date until paid at the rate of eight per centum per annum. To secure the same the said railroad company executed its mortgage of that date to the State of Arkansas, by which it conveyed to the State the Memphis and Little Rock railroad, and the rolling stock of said road, conditioned that said conveyance should be void in case said sum of money should be paid as aforesaid.

That on the twenty-eighth day of June, 1875, William S. Pierson and your orators, Dow and Matthews, filed a bill in this court to foreclose a deed of trust executed to them by the Memphis and Little Rock Railway Company, a corporation then holding said road and other property in subordination to said mortgages to Tate, Brinkley, and Watkins, and to the State of Arkansas as aforesaid, by which they claimed as trustees entitled to have the said road and other property sold for the payment of certain bonds issued by said railway company. That, pending said suit, said bill was amended by making the trustees of the said mortgage of May 1, 1860, parties plaintiff, and making said Memphis and Little Rock Railroad Company a defendant therein, and praying for a foreclosure of said last-named mortgage.

6 That on a final hearing of said cause, on the twenty-first day of November, 1876, a final decree was rendered in this court foreclosing said mortgage of May 1, 1860, and directing said road, charter, and other property named in said mortgage of May 1, 1860, the same being a first lien on the same, to be sold for the pay-

ment of the debts secured by it; under which decree said road, charter, and other property were sold by a commissioner appointed in said cause, and bought in by said Pierson, Dow, and Matthews for the use of the holders of the bonds issued by said Memphis and Little Rock Railway Company, who organized the defendant company, the Memphis and Little Rock Railroad Company (as reorganized), which has acquired said road, charter, and other property mentioned in said mortgage of May 1, 1860, together with all the other property hereinafter mentioned, and has been in possession of them ever since, save and during the time that said road has been operated by a receiver.

That on the first day of May, 1877, the said defendant executed to William S. Pierson, and unto your orators, Dow and Matthews, a mortgage of that date, reciting the issue by the defendant of bonds to the amount of two hundred and fifty thousand dollars, and conveying to said Pierson, Dow, and Matthews, as trustees, the charter of the defendant, with all its rights, powers, privileges, immunities, and franchises, and its railroad and rights of way, and its connections, with all of its other property, conditioned that said conveyance should be void in case said bonds should be paid according
7 to their tenor and effect, as will be seen by reference to a copy of said mortgage herewith filed, as Exhibit B, and made part hereof.

That this was the first lien created against said property by the defendant.

That on the second day of May, 1877, the defendant executed its second mortgage or deed of trust to said Pierson, Dow and Matthews, reciting the issue of bonds by it of that date, amounting in the aggregate to the sum of twenty-six hundred thousand dollars, issued for the purpose of raising money for the construction and equipment of said railroad, and conveying to said Pierson, Dow and Matthews, as trustees therein named, and their successor or successors, and his survivor or survivors, and assigns, forever, all and singular, the railroad and rights of way, from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden and State of Arkansas, to Little Rock, in the county of Pulaski and State of Arkansas, with the connections of the said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad, and any railroad depots or rights of way in the city of Memphis, State of Tennessee, belonging to said railroad company, and all rails, trestles, ties, tracks, side tracks, switches, depots, stations, buildings, water tanks, machine shops, car houses, engine houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies and equipments, which said defendant then owned, or might thereafter acquire or become entitled to, in the States of Arkansas and Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; and also, all and singular, all lands,
8 real estate, property of every kind, real, personal, or mixed, books of account, records, muniments, and evidences of title, and choses in action, which were then owned or might thereafter

be acquired by said defendant; and also the charters, franchises, rights, privileges, and immunities, including the right of franchise to be a corporation, which the said defendant then possessed or owned, or which it might thereafter own or acquire, in the States of Arkansas or Tennessee, or elsewhere; and also all the rents, income, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said defendant from its railroad or other property, or in any other way whatsoever; to have and to hold the same unto the said Dow, Pierson, and Matthews, as trustees as aforesaid, and unto their successor or successors, survivor or survivors, and assigns, forever; conditioned that the said conveyance should be void in case said bonds should be paid according to their tenor and effect. And it was further stipulated therein that said trustees might appoint and employ, at the expense of the said trust estate, all such attorneys, counselors, agents, clerks, cashiers, book-keepers, engineers, or other agents, as might reasonably be necessary, in the execution of any of said trusts, and that they might fix their compensation; providing, further, that said defendant should, from time, as incurred, pay all charges, costs, expenses, and compensation of said trustees and their successors and survivors, in and about or for the execution of said trust, and that it should, in all things, keep said trustees or their successors fully indemnified and saved harmless of, from, and against all costs, damages,
9 charges, and expenses which said trustees or their successors might sustain or be put to in consequence of accepting said trust, or of anything that might be done or omitted to be done under it, saving only such damages as might arise from any culpable act or neglect of said trustees; all of which will be seen by reference to a copy of said mortgage herewith filed, marked Exhibit C, and made part hereof.

Both of said mortgages were duly filed and recorded in the recorder's offices of the various counties in which said property is situated.

Moreover, by said mortgage of May 2, 1877, it was further stipulated as follows:

"That so long as said party of the first part (meaning said defendant) shall not make default in the payment of either principal or interest on any of the aforesaid bonds and coupons as the same may respectively become due and payable, and shall faithfully perform the conditions and stipulations of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof."

Said Pierson having afterwards died, F. H. Cossitt, Henry Talmadge, Peter Geddes, Alfred Sully, your orator, Dow, and John L. Farwell, filed their bill on the chancery side of this court against the defendant herein, showing that they were severally owners of bonds secured by said mortgage of May 2, 1877, and that said Pierson had departed this life, and praying that a successor might be appointed in his place; to which suit the defendant entered
10 its appearance, and on the fifth day of October, 1880, by con-

sent of parties, a final decree was rendered in said cause, on the petition of more than one-third of the holders of the bonds, secured by said last-named mortgage in value then outstanding, by which it was considered that your orator, said Moran, should be, and was appointed a trustee under said mortgage, in lieu of said William S. Pierson. That your orator, Moran, has since accepted said trust, and is now acting as such trustee.

That on the twenty-ninth day of November, 1875, the State of Arkansas filed her complaint in the Pulaski chancery court against the Memphis and Little Rock Railroad Company and others, setting up the execution of the mortgage to the State, above referred to, dated January 10, 1861, stating that nothing had been paid on the debt secured thereby, and praying for a decree of foreclosure, and that the property conveyed thereby might be sold for the payment of said debt.

That afterwards the defendent herein applied to be made a party defendant in said suit, it being in the exclusive possession of the property mortgaged to the State; which application was granted, and that thereupon the said defendant herein answered said complaint and said cause proceeded to a final hearing, upon which it was by said chancery court considered and decreed on the 22d day of December, 1879, that the defendants therein pay to the State the sum of two hundred and two thousand one hundred and thirty-three dollars and thirty-two cents, with costs of suit, with interest on the sum decreed; or that in default thereof, the property thus mortgaged to the State should be sold; from which decree the defendant herein
11 appealed to the supreme court of the State of Arkansas, wherein the same cause came on for hearing on the fourth day of March, 1882, and it was by the supreme court considered and decreed that unless the appellants in said cause, or some one for them, should pay to the commissioner of said court the sum of two hundred and two thousand one hundred and thirty-three dollars and thirty-two cents, with interest on said sum from the 22d day of December, 1879, until the time of such payment, at the rate of eight per centum per annum, and all the costs in said cause in said chancery court, on or before the 30th day of March, 1882, said commissioner should proceed on the day last aforesaid to sell the property mortgaged to the State by the Memphis and Little Rock Railroad Company as aforesaid, for cash, to the highest bidder.

That as all of said property mortgaged to the State of Arkansas was about to be sold under said decree, and the defendant herein declined and neglected to pay said sums named in said decree, your orators, acting as trustees under said mortgage of May 2, 1877, were compelled to pay off said decree in order to protect the rights of the holders of the bonds and coupons secured by said mortgage of May 2, 1877. Accordingly, on the 25th day of March, 1882, your orators, acting as aforesaid, did pay off said decree, amounting to $239,672.71.

Your orators thereupon, on the 28th day of April, 1882, filed their bill on the chancery side of this court, against the defendant herein, setting up specifically all of the foregoing facts, and prayed

that they, as trustees as aforesaid, might be subrogated to the
12 rights of the State of Arkansas under said decree of the supreme court of that State, and that in default of the payment of said sum by said defendant, the property embraced in said mortgage might be sold and its proceeds applied to the repayment of said moneys.

The defendant herein filed an answer in said cause, in which it admitted all the facts hereinbefore stated, but alleged that said bonds of May 2, 1877, and the mortgage securing the same, were obtained by fraud, and that they were illegal and without any consideration. Said defendant also in said suit filed a cross-bill against your orators, setting up the same matters as those stated in said answer, and prayed therein that said bonds and mortgage last named might be cancelled.

Your orators in said suit excepted to said answer, because it showed no defense to said suit, and demurred to said cross-bill, because it showed no equity on its face.

On a final hearing, a decree was rendered in said cause on the 12th day of May, 1883, dismissing said cross-bill for want of equity, and granting your orators the relief prayed by them in their said bill, which decree remains of record in this court, in full force and unreversed.

A copy of said bill, answer, and cross-bill are herewith filed, marked Exhibits D, E, and F, and they are made part thereof.

About the same time that said defendant filed said answer and cross-bill in this court, it filed in the United States circuit court for the southern district of New York, in chancery, its bill against
13 your orators, setting up the same matters as stated in said cross-bill, and praying the same relief prayed for therein, a copy of which bill, with the exhibits, is herewith filed and marked Exhibit G; which bill was answered by your orators, denying the fraud, illegality, and want of consideration alleged in said bill.

Said suit came on for final hearing on the 11th day of February, 1884, and said bill of said defendant herein was by said court dismissed for want of equity, which decree remains in full force and unreversed, as will appear by a copy thereof to be herewith filed as Exhibit H.

In its answer and cross-bill filed in said suit, brought in this court, and in its bill filed in New York, the defendant alleged that all the property covered by said mortgage of May 2d, 1877, was of far less value than the amount of the bonds secured thereby.

Attached to said bonds, secured by said mortgage of May 2d, 1877, are coupons for semi-annual interest thereon to the time of the maturing of said bonds (which will be on the first day of July, 1907), at the rate of 8 per centum per annum, payable on the first days of January and July in each year.

Said defendant, with the intention of defrauding the holders of said bonds and coupons, has refused, under the false pretences aforesaid that said bonds and mortgage were procured by fraud, and illegal and without consideration—has refused to pay the said cou-

pons falling due July 1, 1882, and all that have matured since that time, and they now remain wholly unpaid.

14 On the 24th day of June, 1882, said defendant confessed a judgment in this court in favor of Russell Sage, who is a large owner of its stock, for the sum of $125,921.13. On the same day said Sage filed his complaint in the Pulaski chancery court, held in the city of Little Rock, against the defendant herein, setting forth therein the recovery of said judgment, and alleging that all the property and assets of said company were mortgaged for more than their value, and praying for the appointment of a receiver to take charge of said road and to operate it, and for the payment of said judgment out of its net earnings.

On the same day that said complaint was filed the defendant entered its appearance thereto, and consented to the appointment of a receiver, and the court at once appointed a receiver as prayed; and by the mutual consent of the parties thereto one E. K. Sibley, who was the general manager of the defendant herein, was appointed as such receiver, and, upon the execution of a bond in the penal sum of $50,000, was directed by said chancery court to take charge of said road as receiver and operate it; which he according did on said 24th day of June, 1882.

Said suit between said Sage and said defendant was wholly collusive, and was begun and maintained with no other view than that of avoiding the payment of its debts, and particularly the interest accruing on its said bonds.

Said cause was afterwards removed to this court, and said receiver was continued, by the mutual consent of the parties thereto, until the 3rd day of December, 1883, when he was discharged by this court on its own motion, on the ground that the suit was collusive, as appears of record in this court. Said last-named suit is still pending.

15 Immediately upon the appointment of said receiver the directors of said defendant, and all of its officers, for the same purpose of avoiding the payment of its debts, resigned, with the intent to prevent the service of process on the defendant.

The whole object and aim of said Sage and of said defendant in procuring the appointment of said receiver was to prevent the enforcement of said coupons and to depreciate said bonds in the market so as to defraud the holders thereof.

A large number of the holders of said coupons have sued upon them, and have obtained judgments at law upon them in this court.

Said judgments remaining unpaid, the plaintiffs therein have severally filed bills on the chancery side of this court, setting forth their judgments, and praying that the liens of said judgments may be foreclosed, and that the property of said defendant may be sold for the payment thereof, which suits are still pending.

On the 10th day of April, 1883, the Equitable Life Assurance Society, and others joining with it, all acting in collusion with the defendant herein, filed a bill on the chancery side of this court against said defendant, alleging that they were the holders of a

number of the bonds secured by said mortgage of the defendant of May 1st, 1877, asking for a receiver for said road, and that said last-named mortgage might be foreclosed.

On the 8th day of October, 1883, said defendant filed its
16 answer in said suit of the Equitable Life Assurance Society, which contains the following statement:

"It states that since the execution of said bonds it has exhibited its bill in chancery against the trustees in said last-named mortgage (meaning said mortgage of May 2, 1877), and the holders of the bonds secured thereby, as far as they could be ascertained, in the circuit court of the United States for the southern district of New York, praying that said bonds and mortgage might be cancelled for the reason, as respondent alleges, that they are absolutely void, and were illegally issued and in violation of law. Should it be decided in that case that said bonds are valid, and that respondent is liable therefor, it admits its debts, obligations, and liabilities largely exceed the value of its property of every character."

Said suit is still pending.

Said Dow and the other trustees of said mortgage of May 1, 1877, have filed a bill on the chancery side of this court against said defendant, praying a foreclosure of said last-named mortgage of May 1, 1877, which suit is still pending.

It is not true, as so often stated by said defendant in said several suits, that it was not able to pay its debts. It had an ample income for operating its road and making all necessary repairs and betterments, and for paying all its debts as they matured; its net receipts since its default in the payment of said coupons having never been less than four hundred thousand dollars per annum. But during
all of said time defendant, by reason of said collusive suit,
17 and the abuse of the powers of the court, has appropriated all of its income exclusively to its own use.

The officers of the defendant, seeing that these devices cannot be any longer made successful, have repeatedly declared that unless the holders of the bonds and coupons of May 2, 1877, would accept such terms as the defendant might dictate they would make all they could out of the road, would run it down, and would abandon it in a ruinous condition to the holders of said bonds and coupons.

Your orators say that with the great amount of overdue and unpaid interest on said bonds of May 1, 1877, and May 2, 1877, and the said decree for money paid to the State of Arkansas, the said property as it exists in the hands of said defendant is not a good or sufficient security for the bonds and coupons of May 2, 1877; and they fear, and have reason to fear, that if said property is left in its present condition, the value of said security will be further and very greatly impaired.

Your orators pray that said defendant may be required to answer this bill, but not under oath, and that, until a final hearing of this cause, the court may order and direct that all of said property and assets conveyed by said mortgage of May 2, 1877, may be placed in the hands of a receiver to be appointed by this court, and that said

road may be operated and managed by said receiver under the orders of the court, or in the hands of your orators as trustees.

That on a final hearing herein said property and assets may be decreed to be placed in the hands of your orators as trustees under said mortgage of May 2, 1877, according to the terms of said mortgage; and that the defendant may be enjoined from interfering with their possession, or disturbing it in any way; and to that end your orators offer to execute a good and sufficient bond for the faithful performance of their duties as such trustees, or upon such conditions as the court may direct; and that your orators may have such other and further relief as equity may require.

18

And for process of subpœna against said Memphis and Little Rock Railroad Company (as reorganized).

U. M. & G. B. ROSE, *Solicitors.*

19 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

The President of the United States to the Memphis and Little Rock Railroad Company, as reorganized, Greeting:

We command and strictly enjoin upon you that, laying all other matters aside, and notwithstanding any excuse, you, and each of you, be and personally appear before the judges of our circuit court of the United States in and for the eastern district of Arkansas, in chancery sitting, on the 7th day of April, 1884, it being the first Monday of April next, wheresoever the said court shall then be, and there to answer a bill of complaint exhibited against you in our said court by Robert K. Dow, Watson Matthews, and Charles Moran, and to do further and receive what our circuit court shall have considered in that behalf; and this you are not to omit, under penalty of what the law directs.

In testimony whereof, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed, this 12 day of February, 1884, and in the 108th year of our Independence.

Attest: [L. S.] RALPH L. GOODRICH, *Clerk*,
By W. P. FIELD, *D. C.*

N. B.—The defendant is required to enter its appearance in the above cause in the clerk's office of this court on or before the 7th day of April, 1884, or the bill will be taken *pro confesso* against it.

RALPH L. GOODRICH, *Clerk*,
By W. P. FIELD, *D. C.*

20 Endorsed: Issued Feb. 12, 1884. Returnable April 7, 1884. Returned and filed February 16, 1884. Ralph L. Goodrich, clerk.

I have served the within subpœna on the within by delivering a copy to E. K. Sibley, as receiver, and John W. Goodwin, as secretary

and treasurer, at the city of Little Rock, in the eastern district of Arkansas, on this 15th day of February, 1884.

D. B. RUSSELL,
U. S. Marshal for East. Dist. Ark.

Fees.

2 services	$4 00
2 copies	60
	$4 60

21 On March 24, 1884, the following proceedings were had:

Come the complainants, by U. M. & G. B. Rose, Esqs., their solicitors, and file herein their amendment to the bill of the complainant, and also their motion for the appointment of a receiver, and comes the defendant, by B. C. Brown, Esq., its solicitor, and [file] herein the affidavits of Wynne, Essex, Brown, Sibley, Goodwin, and John C. Brown; also demurrer to bill and two exhibits.

Which amendment was in words and figures, as follows:

22 In the United States Circuit Court for the Eastern District of Arkansas.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized), Defendant.

Come your orators, said plaintiffs, and, by way of amendment of their original bill herein, they say that since the filing of the same they have brought an action of ejectment, on the common-law side of this court, against said defendant for the recovery of the real estate described in said mortgage of May 2, 1877; which suit is still pending in this court.

By the terms of the bonds secured by the mortgage of May 2, 1877, the several sums of money therein mentioned bear interest at the rate of 8 per centum per annum, payable semi-annually on the first days of January and July in each year, as evidenced by coupons thereto attached; all of said coupons that have matured since the first day of January, 1882, remain overdue and unpaid.

U. M. & G. B. ROSE, *Sol'rs.*

I, R. K. Dow, swear that the matters set forth in the above amendment are true.

R. K. DOW.

Subscribed and sworn to before me, this 24th day of March, 1884.

RALPH L. GOODRICH,
U. S. Com'r.

23 Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

24 Which motion was in the words following, to wit:

In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as reorganized), Defendant.

Comes said plaintiffs and move the court to appoint a receiver to take charge of the property described in the bill herein, or to cause it to be delivered to themselves as trustees upon the execution of such bond as may be required of them by the court.

U. M. & G. B. ROSE, *Sol'rs.*

Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

25 Which demurrer was in the words and figures following, to wit:

The Demurrer of the Defendant to the Bill of Complaint of the Complainants.

United States Circuit Court for the Eastern District of Arkansas.

R. K. DOW *et als.*, Complainants,

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Defendant.

This defendant, not confessing all or any of the matters and things in the plaintiffs' bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to the said bill, and for cause of demurrer shows—

First. That the plaintiffs have not made or stated such a case as entitles him to the relief prayed or any part thereof.

Second. There is no equity in the bill.

Third. There are not sufficient parties defendant thereto.

Fourth. That the plaintiff has a plain, adequate, and complete remedy at law.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

B. C. BROWN,
Counsel for Def't.

26 Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

27 Which affidavits were in words as follows:

Affidavit of John W. Goodwin.

In the Circuit Court of the United States for the Eastern District of Arkansas.

R. K. Dow *et als.*,

v.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

John W. Goodwin, being sworn, says that on the 15th day of February, 1882, he was appointed by the directors secretary of the Memphis and Little Rock Railroad Company, as reorganized, and as such kept the books thereof; that he has continued to hold such office from that day to the present; that he did not resign his position at the time the property of the said defendant company was placed in the hands of E. K. Sibley as receiver in the case of Sage *v.* The Memphis and Little Rock Railroad Company, as reorganized, but continued to hold the same; that on October 7th, 1882, he tendered his resignation, but it was not accepted, and he continued to hold such office.

He further says that the statements made in the complainants' bill of complaint, that the officers of said company have stated that it was their intention to make all they could out of the property, let it run down, and abandon it in a ruinous condition to the bondholders, is untrue, so far as he is concerned; that he has never made any such statement himself, nor authorized any one else to make it for him, nor has he ever made a statement of any character to justify the allegations in the bill.

He further says that it appears, by the books of the company, that F. A. Marquand, E. K. Sibley, Thomas Essex, B. C. Brown, and Jay Gould were elected directors of the Memphis and Little Rock Railroad Company February 15, 1882; that F. A. Marquand
28 was by the directors elected president of the said company, and served as such during the year; that the said F. A. Marquand did not resign his position as president, but continued to serve as such from the time of his election until the succeeding annual election on the 15th of February, 1883. He further says, as appears by the record, Jay Gould resigned his position as director, his resignation being dated April 29, 1882. At a meeting of the directors, held May 5, 1883, such resignation was accepted, and R. S. Hayes was elected director in his stead, and that neither Thomas Essex nor said R. S. Hayes resigned their position upon the appointment of the receiver in the case of Russell Sage *v.* The Memphis and Little Rock Railroad Company, as reorganized, but continued to hold the same up to the next election, and, by subsequent elections, up to the present time.

JOHN W. GOODWIN.

Subscribed and sworn to before me, this —— day of ——, 1884.

[L. S.] J. M. ROSE,
Notary Public.

Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

29 *Affidavit of Thomas Essex.*

In the United States Circuit Court, Eastern District of Arkansas.

R. K. Dow *et als.*
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

Thomas Essex, being sworn, says: That he was elected a director of the defendant corporation, The Memphis and Little Rock Railroad Company, as reorganized, on the 15th day of February, 1882; that he was director thereof on the 24th day of June, 1882, when the property of the said defendant corporation was placed in the hands of E. K. Sibley, as receiver, in the case of Russell Sage *v.* Memphis and Little Rock Railroad Company, as reorganized; that he did not resign his position as such director, but continued to hold the same up to and until the 15th day of February, 1883, upon which date he was again elected a director of the defendant company, which position he continued to hold until the 15th day of February, 1884, when he was again elected a director, and he is still a director of the said company. He further says that the statement made in the complainants' bill of complaint that the officers of the defendant corporation have stated that it was their intention to make all they could out of the property, let it run down, and abandon it in a ruinous condition to the bondholders, is
30 untrue; that he never made such a statement himself, and never authorized any one else to make any such statement for him, nor did he ever say anything of a character which would justify the statement in the bill.

THOMAS ESSEX.

Subscribed to and sworn to before me, at Little Rock, Arkansas, this —— day of March, 1884.

[L. S.] J. M. ROSE,
Notary Public.

31 *Affidavit of B. C. Brown.*

In the United States Circuit Court for the Eastern District of Arkansas.

R. K. Dow *et als.*
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

B. C. Brown, being sworn, says he resigned his position as director of the defendant, The Memphis and Little Rock Railroad Company, as reorganized, by a letter addressed to the president of the said company, dated May 6, 1882, and has not been a director of the said company since. He further says that the statements in the complainants' bill of complaint, to the effect that the officers of the defendant company have stated that it is their intention to make all they could out of the road, let it run down and abandon it to the bondholders, is, so far as he is concerned, untrue; that he never

made any such statement himself, nor authorized any one else to make it for him, nor did he ever make any statement of the character to justify the allegations in the bill. Affiant further says that he was acting as the general counsel and attorney of the defendant company for some time before the appointment of the receiver in the cause of Rusell Sage *v.* The Memphis and Little Rock Railroad Company, as reorganized; that E. K. Sibley had before that been acting as general manager of the company and was director therein; that affiant advised the said E. K. Sibley that his position as general manager and director might at some time bring him in
32 conflict with his duties as receiver, and upon such advice the said E. K. Sibley thereupon resigned both offices; that affiant did not at the time of giving such advice have any intent to avoid the service of process upon the company, and the fact that there was no officer of the company within the State upon whom legal process could be served was not called to his attention till about the beginning of October, 1882, or near that time, and at that time nothing could be done to remedy the defect; that the earliest action that could be had was taken at the meeting of the stockholders on the 15th day of February, 1883, at which meeting a resolution was passed, a copy of which is hereto attached, authorizing this affiant, as counsel of the defendant company, to enter its appearance to all suits brought against it; that from the date until the present time this affiant has entered the appearance of the said company to the suits brought against it in every case promptly whenever advised that a suit of any character had been brought against it. Affiant, being attorney of the company, knows that the resignation mentioned above, which, so far as he knows, was the only resignation of any general officer of the company, which occurred at or about the date of the appointment of the receiver, was not made for the purpose of avoiding service of process or with any such intent.

B. C. BROWN.

Subscribed and sworn to before me, this 24th day of March, 1884.

[L. S.] J. M. ROSE,
Notary Public.

Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

33 *Affidavit of J. W. Wynne.*

In the Circuit Court of the United States, Eastern District of Arkansas.

R. K. Dow *et als.*
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

J. W. Wynne, being duly sworn according to law, says: That he was elected a director of the Memphis and Little Rock Railroad Company as reorganized, by the stockholders at a meeting held on the 15th day of February, 1883, and held that position until the 15th day of February, 1884, upon which day he was again elected di-

rector, and that he is still a director in the said company. He says that the averment in the complainant's bill to the effect that the officers of the said defendant company have asserted that it was their intention to make all they could out of the property, let it run down and abandon it in a ruinous condition to the bondholders, is, so far as he is concerned, untrue; that he has never made any such statement or assertion himself, nor has he ever authorized any one else to make such a statement for him, nor did he ever say anything of such a character as to justify the assertions in the bill.

JESSE W. WYNNE.

Subscribed and sworn to before me, this — day of March, 1884.

[L. S.] J. M. ROSE,
Notary Public.

Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

34 *Affidavit of John C. Brown.*

In the Circuit Court of the United States, Eastern District of Arkansas.

R. K. Dow *et als.*
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

John C. Brown, being duly sworn, says: That he was elected a director of the Memphis and Little Rock Railroad Company, as reorganized, by the stockholders at a meeting held the 15th day of February, 1883, and held the position until the 15th day of February, 1884, upon which date he was again elected a director, and that he is still a director in said company. He says that the averment in the complainants' bill to the effect that the officers of the said defendant company have asserted that it was their intention to make all they could out of the property, let it run down and abandon it in a ruinous condition to the bondholders, so far as he is concerned, is untrue, nor did he ever say anything of any character to justify the statements of the bill; that he never has made such a statement or assertion himself and has never authorized any one to make it for him. He further says that he is well acquainted with R. S. Hayes, the president of the defendant corporation, and with D. S. H. Smith, who is one of the directors thereof; that the said R. S. Hayes was elected president of the said defendant company on the 15th day of February, 1883, and continued to hold the office until he was again elected director on the 15th day of February, 1884, and by the directors of said company he was again elected
35 president of the corporation; that D. S. H. Smith was elected a director of the defendant corporation on the 15th day of February, 1883, which office he continued to hold until he was again elected on the 15th day of February, 1884, and he is still a director of the said company; that his relations with the said Hayes and Smith, socially and in business matters, are very intimate, particularly in regard to the affairs of the defendant corporation; that he

has had occasion to consult with both, more especially with the president, R. S. Hayes; that he has never heard the said R. S. Hayes or D. S. H. Smith, or either of them, make any such assertion or statement, and that he does not believe either of them has ever made any such statement of that character, or any statement which would justify the allegations in the bill.

JOHN C. BROWN.

Subscribed and sworn to before me, this —— day of ——, 1884.
[L. S.] J. M. ROSE,
Notary Public.

Endorsed: Filed March 24, 1884. Ralph L. Goodrich, clerk.

36 And on March 26, 1884, the following proceedings were had:

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN
vs. } 603.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

Comes the defendant, by B. C. Brown, Esq., its solicitor, and by leave of the court withdraws its demurrer to the bill, and also files the affidavits of R. S. Hays, D. S. H. Smith, and F. A. Marquand.

37 Which affidavits are in words and figures as follows:

United States Circuit Court, District of Arkansas.

Dow *et al.*
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

SOUTHERN DISTRICT OF NEW YORK, } *ss:*
County and City of New York, }

R. S. Hayes, being duly sworn, says: I am the president of the Memphis and Little Rock Railroad Company, as reorganized, defendant in the above-entitled action. I have been informed by the counsel for said company that in the bill of complaint herein the complainants allege, among other things, that immediately upon the appointment of a receiver in the Sage case, meaning thereby an action recently brought by Russell Sage against the said company, the directors of the said railroad company, meaning thereby the company defendant herein, and all its officers, for the purpose of evading the payment of its debts, resigned with the intent of preventing the service of process upon the defendant.

The said allegations are not true, nor to the best of my knowledge and belief is any part of the same true. I was a director of the said company at the time of the appointment of the receiver referred to. I did not myself resign such directorship at that time, or any time, for the purpose of avoiding the payment of its debts by said
38 company, nor did I resign with the intent to prevent the service of process on said defendant.

I believe that I know the reasons for the resignations in the cases

of such of the directors and officers of said company as have resigned since the time of the appointment of said receiver, and to the best of my knowledge, information, and belief, no director of said company has resigned either to enable said company to avoid payment of its debts or to prevent the service of process upon the defendant.

I am also informed that the bill of complaint herein contains an allegation that the officers of the railroad company have repeatedly declared that unless the holders of the bonds and coupons of May 2, 1877, would accept such terms as the defendant might dictate they would make all they could out of the road, would run it down, would abandon it in a ruinous condition to the holders of said bonds and coupons. No part of said allegation is true, but the same is in every respect wholly false. On the contrary, during the time the road was in the hands of the receiver I urged the receiver to expend all moneys earned upon the improvement of the property, and at all times on every proper occasion during said receivership favored such expenditure.

R. S. HAYES.

Sworn to before me, this 22 day of March, 1884.
[L. S.] W. W. COTTON,
Kings County, New York.

Certificate filed in New York county.

39 U. S. District Court, District of Arkansas.

DOW *et als.*
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

SOUTHERN DISTRICT OF NEW YORK,
City and County of New York:

D. S. H. Smith, being duly sworn, says: I am the assistant treasurer of the Memphis and Little Rock Railroad Company, as reorganized, defendant in the above-entitled action. I have been informed by the counsel for said company that in the bill of complaint herein the complainants allege, among other things, that the officers of said railroad company have repeatedly declared that unless the holders of the bonds and coupons of May 2, 1877, would accept such terms as defendant might dictate, they would make all they could out of the road, would run it down, and would abandon it in a ruinous condition to the holders of said bonds and coupons. The said allegation is not true, but wholly false. On the contrary, during the time the road was in the hands of the receiver, it is within my knowledge that the president urged the receiver to expend all moneys earned upon the improvement of the property, and, to the best of my knowledge, information, and belief, the officers of the company have at all times, and on every proper occasion, during said receivership, favored such expenditure.

D. S. H. SMITH.

Sworn to before me, this 22 day of March, 1884.
[L. S.] W. W. COTTON,
Notary Public, Kings County, New York.

Certificate filed in New York county.

Endorsed: Filed March 26, 1884. Ralph L. Goodrich, clerk.

U. S. Circuit Court, Eastern District of Arkansas.

R. K. Dow *et als.*
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York }

F. A. Marquand, being duly sworn, says: I have been informed by the counsel for the Memphis and Little Rock Railroad Company, as reorganized, defendant in the above entitled action, that in the bill of complaint herein the complainants allege, among other things, that immediately upon the appointment of a receiver in the Sage case, meaning thereby an action recently brought by Russell Sage against said company, meaning thereby the company defendant herein, all of its officers, for the purpose of evading the payments of its debts, resigned with the intent of preventing the service of process on the defendant. The said allegations are not true, nor, to the best of my knowledge and belief, is any part of the same true. I was president and director of the said company at the time of the appointment of the receiver referred to. I did not myself resign such presidency or such directorship at that time, nor at any time, for the purpose of avoiding the payment of its debts by said company, nor did I resign with the intent to prevent the service of process on said defendant. To the best of my knowledge and information and belief no director of said company has resigned either to enable said company to avoid payment of its debts, or to prevent the service of process upon the defendant.

F. A. MARQUAND.

Sworn to before me, this 22 day of March, 1884.
[L. S.] W. W. COTTON,
Notary Public, Kings County, New York.

Certificate filed in New York county.

Endorsed: Filed March 26, 1884. Ralph L. Goodrich, clerk.

In the United States Circuit Court for the Eastern District of Arkansas. In Equity.

R. K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,
v.
MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Defendant.

I, R. K. Dow, say that at an interview had at the office of F. H.

Cossitt, in the city of New York, since the beginning of the present litigation between myself and others with R. S. Hayes, president of the defendant company, said Hayes said that the road could not stand up under its mortgage at eight per cent.; that if the litigation went on and the bondholders were successful they would let the road go and build a cut-off to connect the St. Louis, Iron Mountain and Southern railway with the Kansas City road, and that they would do all their business that way. I further say that during the years of 1882 and 1883 said Hayes, Jay Gould, and Henry G. Marquand frequently proposed to said trustees and to the bondholders to discontinue all litigation on their part if the bondholders would surrender their bonds and take the six per cent. bonds in their stead. As this would involve a total loss of about one million three hundred thousand dollars in interest for the benefit of the present stockholders, who had bought expressly subject to the said bonds, the bondholders would not consent to said reduction.

They were also largely actuated by the consideration that if the present bonds are not proof against vexatious suits any
44 new bonds received in their stead would be subject to the same difficulties.

R. K. DOW.

Subscribed and sworn to before me, this 26th day of March, 1884.

RALPH L. GOODRICH, *Clerk*,
By W. P. FIELD, *D. C.*

45 And on March 27, 1884, the following proceedings were had:

On this day comes the plaintiffs, by U. S. & G. B. Rose, their solicitors, and also comes said defendant, by B. C. Brown, its solicitor, and it is now ordered that both parties have leave until the 7th day of April next to file printed briefs on the motion for the appointment of a receiver herein; and it is further ordered that the defendant until further order herein hold the property mentioned in the bill subject to the order of the court. And defendant has leave to plead, answer, or demur to the bill of complaint herein on said seventh day of April.

46 And on April 7, 1884, the following proceedings were had:

Comes the defendant, by John C. Brown and B. C. Brown, Esqs., its solicitors, and files herein its demurrer and answer to the bill for possession filed herein; which answer is in words and figures as follows:

47 In the Circuit Court of the United States for the Eastern District of Arkansas. In Chancery.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN,
Plaintiffs,
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Defendant.

Endorsed: Filed April 7, 1884. Ralph S. Goodrich, clerk.

48 In the Circuit Court of the United States for the Eastern District of Arkansas. In Chancery.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Defendant.

The answer of the Memphis and Little Rock Railroad Company (as reorganized) to the bill in chancery in this honorable court, exhibited against it by Robert K. Dow, Watson Matthews, and Charles Moran.

This respondent, now and all times hereafter, saving and reserving all and all manner of exception to the manifold imperfections, inconsistencies, etc., in the said bill of complaint, for answer thereto, or unto so much thereof as it is advised it is material or necessary for it to make answer unto, answering says:

That it admits that the Memphis and Little Rock Railroad Company was a corporation created by the State of Arkansas, organized under the act mentioned in the bill.

That the said railroad company, on the first day of May, 1860, issued its $1,300,000 of bonds, and to secure the payment thereof executed its deed of trust or mortgage to Sam. Tate, Robert C. Brinkley, and George C. Watkins, which deed is described in the bill,
49 and which was also duly recorded in the several counties in which the said company had any property before the tenth day of January, 1861.

It admits that on the tenth day of January, 1861, the same company borrowed from the State of Arkansas the sum of $100,000, to be repaid ten years after date, with interest thereon, at the rate of eight per cent. per annum, and, to secure the payment thereof, executed its mortgage of that date to the said State, by which it conveyed its railroad and rolling stock upon the condition mentioned.

It admits that on the twenty-eighth day of June, 1875, William S. Pierson and orators, Dow and Matthews, filed a bill to foreclose the deed of trust executed to them by the Memphis and Little Rock Railway Company, a corporation holding said road and property in subordination to the mortgages to Tate and the State of Arkansas.

It further admits that, pending the said suit, the bill was amended by making the trustees of the mortgage of May, 1860, parties plaintiff, by praying for the foreclosure of the said last-named mortgage, and that on the twenty-first day, of May, 1876, a final decree was rendered by this court foreclosing the mortgage of May 1, 1860.

That under said decree the said road, charter, and other property of said former railroad company were sold by a commissioner appointed, and bought by said Pierson, Dow and Matthews, for the use of the holders of the bonds issued by the Memphis and Little Rock Railway Company, and that said bondholders organized the defendant company, the Memphis and Little Rock Railroad Company (as reorganized), and that this defendant has acquired the road, charter,

and other property mentioned in the said deed of May 1, 1860, and has been in possession of them ever since, except during the time the road was operated by the receiver.

It admits the execution of the mortgage deed made Exhibit B, with the bill, and it admits that this was the first lien created against the property of this defendant.

50 It admits that on the [redacted] second day of May, 1877, it executed the mortgage marked C, with the bill, and that the said mortgage is properly described, and that Exhibit C is a true copy thereof; and it admits that both these said mortgages were duly filed and recorded in the various counties in which the property is situated.

But defendant says that the said mortgage and bonds, to secure which it was executed, were and are illegal and void, because it says:

That the Memphis and Little Rock Railroad Company was chartered by and organized under the act of the General Assembly of the State of Arkansas, passed and approved January 11, 1853, entitled "An act to incorporate the Memphis and Little Rock Plank or Railroad Company," a true copy of which is herewith filed, marked "A," and made part of this answer. That the first company thereunder organized was called and known as the "Memphis and Little Rock Railroad Company," and under that name began the construction of the railroad in said act mentioned, and for some years carried on and conducted business, doing, among other things, the matters and things hereinafter mentioned.

That said railroad company, while in life and active existence, being authorized to borrow money, did, on the first day of May, 1860, execute and issue its thirteen hundred several bonds, by each of which it promised to pay to bearer, on the first day of May, 1890, in the city of New York, the sum of one thousand dollars, with interest from date at the rate of eight per cent. per annum, payable semi-annually, on the first days of May and November in each year, on the presentation of coupons to said bonds attached; that to secure payment of the interest and principal of said bonds it, on said day, by its proper deed, conveyed "the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite the city of Memphis aforesaid, to the city of Little

51 Rock, in the State of Arkansas, its road-bed, right of way, and all works and rolling stock of or belonging to said company, together with the charter by which said company was incorporated and under which it is organized, and all the rights and privileges and franchises thereof; and also all the lands lying in the State of Arkansas, granted to said party of the first part by the State of Arkansas by the act of the Legislature of said State, approved January [redacted]9, 1855, and by the act of the Congress of the United States approved the 9th day of February, 1853, which said Memphis and Little Rock Railroad Company now own," to Sam. Tate, George C. Watkins, and R. C. Brinkley, upon various trusts therein mentioned, among which was the power, upon certain conditions, to sell and convey the charter of said company, and all the premises in

said deed conveyed; all of which appears, reference being had to a true copy of said deed herewith filed, marked "B," and made part of this answer.

That afterwards the same company applied to the State of Arkansas, and received from that State, twelve hundred thousand dollars of the railroad aid bonds issued by that State. That said same company, also, on January 10, 1861, borrowed from the State of Arkansas one hundred thousand dollars, to be repaid in ten years, with eight per cent. per annum interest, and secured payment thereof by mortgage of its road and rolling stock, duly executed and delivered.

That afterwards, on the first day of March, 1871, the same railroad company (its road not yet being completed), to borrow other moneys, executed its certain other one thousand bonds, by each of which it promised to pay the bearer, at the Bank of Commerce, in the city of New York, one thousand dollars on the first day of January, 1901, with interest from date, payable semi-annually at the same place, at the rate of seven per centum per annum, and to secure payment thereof, by its deed of that date, conveyed the
52 same railroad and its appurtenances, its lands, franchises, and all and singular its other property of every character pertaining to its main line from Memphis to Little Rock, to Henry F. Vail, upon certain trusts in said deed mentioned, the material one whereof was that upon certain defaults said trustee might and should sell and convey the same, said conveyance being expressly made subject to the lien of the former deed hereinbefore mentioned; all of which appears, reference being had to a true copy of said deed herewith filed, marked "C," and made a part of this answer.

Defendant further states that the default in payments upon the series of bonds last-mentioned, or upon such as were sold and outstanding, having occurred, said Vail, on due notice and according to the powers and provisions of said last-named deed, sold the premises in said last-named deed mentioned and conveyed, subject to the lien of said former deed, and that at said sale, which was made at Hopefield, in the State of Arkansas, on the 17th day of March, 1873, one Stillman Witt became the purchaser thereof, and that said Vail conveyed the same to said Witt, as appears by a true copy of his deed of conveyance herewith filed, marked "D," and made part of this answer.

That afterward said Witt, by his deed or declaration in trust dated the 29th day of March, 1873, declared that he purchased for himself and the other holders of the bonds of said railroad company secured by the deed to Vail, and which were called its second mortgage bonds, and by his deed conveyed said property to himself and the other holders of said bonds whose names appear in said deed. All of which appears, reference being had to a true copy of said instrument herewith filed, marked "E," and made part of this answer.

Defendant further shows that afterwards said parties named in said last-named deed organized a company to own said road called the "Memphis and Little Rock Railway Company," which has become defunct.

53 Defendant further shows that afterward, about the 18th day of October, 1873, there being then outstanding the old first mortgage bonds of the railroad company, and the said State aid bonds, and certain persons, to orator unknown, holding or claiming to hold other liens upon some of the rolling stock sold by Vail, it was agreed between the railway company and the holders of said bonds and rolling stock liens that said railway company should execute its first mortgage 8 per cent. bonds maturing at thirty years from date to the amount of $2,600,000, secured by a first mortgage of all the premises acquired by it as aforesaid; that it should place $2,400,000 of said bonds in the hands of defendants, James Tinker and R. K. Dow, and of William S. Pierson, such trustees to be authorized—

1. To give to the holders of the old first mortgage bonds (the bonds secured by the deed of the railroad company to Tate, Brinkley, and Watkins) new first mortgage railway bonds for principal and accumulated interest of their said old bonds, the holders of such old bonds to surrender them to the said trustees to be held for the specific benefit of the railway bonds given therefor until all legal questions as to the railway mortgage being a first lien should be settled satisfactorily to the trustees.

2. To use $200,000 in settlement of rolling stock debts, or to return such bonds to the railway company as it paid any of said rolling stock debts, and

3. To give to holders of Arkansas State aid bonds twenty-five per centum of the par or face value of their bonds in such new railway first mortgage bonds, which per centum amounted to $300,000.

Defendant avers that all the old first mortgage bonds were exchanged for railway bonds under this agreement.

Defendant further shows that afterwards the purchasers under the sale by Vail and conveyance by Witt conveyed all the property by their purchase acquired to said railway company by deed dated
54 November 17, 1873, a true copy thereof being herewith filed, marked "G," and made part of this answer; that thereafter, on the first day of December, 1873, said railway company executed and issued its 2,900 bonds, consecutively numbered from 1 to 2,900, by the first 2,500 of which it promised to pay to bearer the sum of one thousand dollars each, and by the last four hundred of which it promised to pay to bearer two hundred and fifty dollars each, on the first day of January, 1904, with interest thereon from the first day of July, 1874, at the rate of eight per cent. per annum, payable semi-annually, all such payments to be made at the office of the New York Guaranty and Indemnity Company, in the city of New York; that, to secure payment of said bonds and interest, said railway company, by its deed dated December 1, 1874, conveyed to the New York Guaranty and Indemnity Company, trustee, and to its successors and assigns, the railroad, charters, franchises, and premises by it acquired as aforesaid, in trust to sell and convey upon defaclt by the railway company in payment of the interest or principal of said deed bonds.

That among other things it was by said deed agreed and provided:

1. That upon default continued for six months in payment of any interest coupons the trustee might declare the principal of said bonds due, and might take possession and sell the premises conveyed.

2. That in case of such sale a majority in interest of the holders of the said railway first mortgage bonds might require the trustee to purchase the premises for the bondholders; that in such case no bondholder should have any claim to the premises or the proceeds thereof except for his *pro rata* share in a new company or corporation to be formed by a majority in interest of the bondholders, and that whenever such new corporation was organized the trustee should convey the premises to such corporation; and

3. That the Guaranty and Indemnity Company might re-
55 sign, and that thereupon the trusts of said deed should devolve upon and be executed by William S. Pierson and the defendants, R. K. Dow and Watson Matthews.

All of which appears, reference being had to a true copy of said deed herewith filed, marked "H," and made part of this answer.

Defendant further states that the said Memphis and Little Rock Railway Company made default in payment of the installment of interest maturing upon its said first mortgage bonds on January 1, 1875; that the said New York Guaranty and Indemnity Company resigned its trust, and that the trusts of said mortgage deed devolved upon and were assumed by said R. K. Dow and Watson Matthews and one William S. Pierson, who has since died; that said Dow, Matthews, and Pierson took possession of the railroad and other property in said deed mentioned on the 29th day of June, 1875; and on the same day they, as trustees of said deed, exhibited their bill in equity in this court against the Memphis and Little Rock Railroad Company, The Memphis and Little Rock Railroad Company, Sam. Tate and R. C. Brinkley, surviving trustees of the deed first herein mentioned, and certain others, as trustees of junior deeds executed by the railway company, whose names it is unnecessary to mention, in and by which bill they alleged the execution of said deed and issue of the bonds therein mentioned, the default in payment of interest; that such default had continued six months, and that, as trustees, they had declared the principal of said bonds due, and by which bill they prayed the court to foreclose the equity of redemption existing in said railway company, and for sale of the said railroad and other property by said deed conveyed.

That afterward, and while said cause in said court was still pending, they, by leave of the court, amended their bill by striking out the
names of Sam. Tate and R. C. Brinkley, trustees of the first here-
56 in named deed, as defendants, and by making them and said Wm. S. Pierson, as trustees thereof, parties complainant, and thereupon on the same day filed an amendment to their original bill, in and by which they stated the proposition made by the railway company to the holders of the bonds secured by said deed to Tate and Brinkley, the acceptance thereof by the parties who signed the same; that most of the holders of said first mortgage bonds and coupons had accepted the same and had surrendered their bonds;

that the holders of less than one hundred said first mortgage bonds had refused to accede to said proppsition; that large amounts of interest accruing on the bonds secured by that mortgage had accrued and was unpaid, and prayed foreclosure of said deed to Brinkley, Tate, and Watkins, and sale of the property, and that the moneys arising from said sales be distributed among the holders of the various bonds as equity might require. A copy of said amendment to said complaint is herewith filed, marked "I," and made part of this answer, and a copy of the original bill in said cause is filed, marked "I[2]."

Defendant further shows that on the same day the matters arising upon said original bill and amendments being heard, the court rendered a decree, in and by which, after reciting the execution of the mortgage by the railroad company to Tate, Brinkley, and Watkins, which in said decree was called the "first mortgage," the execution by the same company of the deed to Vail, the sale by Vail and organization of the railway company, which in said decree was called the "second mortgage," it was by the court found that defaults had occurred in payments, and decreed that unless the sums therein found due were paid by the railroad and railway companies respectively before the day of sale that their equities of redemption should be barred and foreclosed and the properties in said deeds conveyed sold by a commissioner of said court for that purpose in and by said decree appointed. And by said decree it was decreed and di-
57 rected that the moneys arising from the sale of the property conveyed in the railroad mortgage (called in said decree the "first mortgage") should be "distributed among the holders of coupons secured by said first mortgage that have not been surrendered on the basis of the first mortgage alone, so that each holder of an overdue coupon, which has not been thus surrendered, should receive of the purchase-money arising from said sale a due proportion of said purchase-money, as computed from the entire issue of said bonds, and that the residue of said purchase-money should be distributed among the holders of the bonds secured by the railway mortgage (in said decree called the 'second mortgage') equally in proportion to the amounts of said second mortgage bonds by them respectively held." The said decree then further provided that after such sale of the premises conveyed by the railroad mortgage, the commissioner should sell in one lot the premises embraced in the railway mortgage (called in the decree the "second mortgage"), and that the proceeds should be distributed among the holders of bonds secured by that mortgage equally. And it was also expressly by said decree directed that if the trustees of said railway mortgage deed should be requested to do so by a majority of the holders of the bonds secured by said mortgage, they might purchase the premises embraced in said railway mortgage, and that in such case no bondholder should have any claim to the premises or to the proceeds thereof, except for his *pro rata* share as represented in a new company or corporation to be formed by a majority in interest of said bondholders for the use and benefit of the holders of the bonds secured by said railway mortgage, and also provided for the bid of

such trustees being received therefor. All of which appears, reference being had to a transcript of said decree herewith filed, marked "J," and made part of this answer.

Defendant further shows that the State of Arkansas was not a party to this suit, and that on March 27, 1875, said State
58 had filed her bill in the chancery court of Pulaski county, Arkansas, for foreclosure of her mortgage aforementioned, which bill was pending at the time of the matters and transactions hereinafter mentioned, and that the sum due the State, and for which she held a lien upon the property conveyed to defendant, amounted to over two hundred thousand dollars, which lien held by the State was superior to the lien of the railway mortgage deed.

Defendant further states that said sales were made on the 27th day of April, 1877, and that at said sale the said Pierson, Matthews and Dow, as trustees of said mortgage of the railway company, purchased the property conveyed in and by the deed of the railroad company to Tate, Brinkley, and Watkins for the sum of one hundred thousand dollars, and that they paid said bid with overdue coupons cut and taken from bonds secured by that mortgage, which had been surrendered by the holders thereof in exchange for the bonds secured by the railway mortgage; and that the same parties as trustees of the railway mortgage also purchased the premises embraced in and conveyed by the said first mortgage deed of the railway company; that the commissioner reported said sales to the court, the names of the purchasers, and the fact that they purchased as trustees, and thereupon, the sale being confirmed, said commissioner, by order of said court, conveyed the premises embraced in both deeds to said Pierson, Matthews, and Dow, "in trust for all the holders of the bonds secured by the first mortgage deed executed by the Memphis and Little Rock Railway Company; and upon the further trust that they will convey the same and all thereof to such company or corporation as may be formed by the holders of a majority of said bonds at such times and on such terms and conditions as a majority of the holders of such bonds may require." All of which appears by reference to a true copy of the deed of said commissioner to said trustees, Pierson, Matthews, and Dow, herewith filed, marked "K," and made part of this answer.

59 Defendant avers that by said purchase the holders of said railway mortgage bonds became and were the beneficial and real owners of all the premises described and conveyed in all the aforementioned deeds, including the aforementioned charter of the Memphis and Little Rock Railroad Company and the railroad from Little Rock, in Pulaski county, Arkansas, to the west bank of the Mississippi river, opposite the city of Memphis, near Hopefield, in Crittenden county, Arkansas. That at the time said railroad was completed between its said termini and equipped or stocked with considerable rolling rock. The railroad and rolling-stock, however, both needed repairs, and the value of the whole premises so purchased under said decree for defendant by their said trustees did not at that time exceed one million dollars; and the value of the whole said premises, at the time of the organization of defendant,

and at the time of the issue of its stock and bonds hereinafter mentioned, subject as it was to the mortgage to the State of Arkansas and to the first mortgage executed by defendant hereinafter mentioned, did not exceed one million dollars. This fact and the value of the property was well known to all of the bondholders and to complainants herein at the time, and they knew that in taking, as hereinafter shown, from defendant its stock to amount of $1,300,000, and its bonds to amount of $2,600,000, therefor, they knowingly took from defendant its obligation for nearly four times the value of the property sold to it. The amount of such stocks and bonds was fixed and declared by themselves, without regard to the value of the property sold defendant, and solely for their own benefit and to obtain a wrongful advantage. Well knowing the value of the property thus purchased by the said trustees and held by them for themselves, and intending to benefit themselves and to injure this complainant by loading it with a burden of indebtedness for which it received no consideration, and which it would be wholly
60 unable to pay, the holders of said railway bonds proceeded to organize this defendant under the charter so purchased, and on the twenty-eighth day of April, 1877, executed articles of organization, signed by themselves personally or by their attorney duly authorized, by which articles of organization they declared the capital stock of defendant to be 13,000 shares of one hundred dollars each, and that all said shares should be deemed as fully paid stock, and distributed such shares (save 25 shares which, by their trustees, they induced certain other persons, citizens of Arkansas, to take, to qualify such persons to act as directors of defendant) among themselves in proportion to the number of railway mortgage bonds held or claimed by each, and also by said articles of organization directed said trustees, Pierson, Matthews, and Dow, to convey the premises, by them so purchased, to defendant, upon condition:

1. "That said railroad company, as reorganized, shall issue its two hundred and fifty bonds, payable to bearer at the office of the Central Trust Company of New York, in the city of New York, each for one thousand dollars, maturing in five equal installments on the first days of May, in the years 1879, 1880, 1881, 1882, and 1883, bearing interest from date at the rate of ten per centum per annum, payable semi-annually at the same place, with coupons for such interest annexed, and shall secure the payment of the principal and interest thereof by a mortgage of all and singular the said property, charter, franchises, rights, privileges, and immunities of which mortgage said Pierson, Matthews, and Dow shall be trustees, and shall deliver the same to the said Pierson, Matthews, and Dow, to be by them sold, and the proceeds applied to the payment of the liens upon the said property reserved by the decree of the said court directing the sale thereof, and to the payment of moneys borrowed by them to make the cash payment required by said decree.

61 2. "That said Memphis and Little Rock Railroad Company, as reorganized, shall execute and deliver to said Pierson, Matthews, and Dow its two thousand five hundred and seventy-five other bonds, each for the sum of one thousand dollars, and its

one hundred other bonds, each for two hundred and fifty dollars, payable at the same place thirty years after date, bearing interest from the first day of July, 1878, and until the first day of July, 1882, at the rate of four per centum per annum, and after the last-named date, at eight per centum per annum, payable at the same place, with coupons for such interest attached, and shall make provision for a sinking fund for redemption of such bonds, and shall secure payment of said bonds, interest, and sinking fund by a mortgage of all said property, charter, franchises, rights, privileges, and immunities, of which mortgage said Pierson, Matthews, and Dow shall be trustees, such last-named bonds to be by said Pierson, Matthews, and Dow equally distributed among the holders of the bonds secured by the mortgage of the Memphis and Little Rock Railway Company, of date December 1, 1883."

All of which will more fully appear, reference being had to a true copy of said articles of organization herewith filed, marked "L," and made part of this answer.

At the date of said conveyance, defendant avers that said premises and property conveyed to it were not worth to exceed $1,000,000, and were known to the grantors and those whom they represented to be worth only that sum, and the same were fully paid for by the 13,000 shares of stock of the defendant, amounting to $1,300,000, then and there received by its vendors.

Defendant further avers that it being thus required to issue 13,000 shares of full paid stock, and deliver the same to its said vendors as part of the same transactions, by their deed dated April 30, 1877, said trustees, Pierson, Matthews, and Dow, conveyed the premises so purchased under said decree to defendant, in and by
62 which deed they also required defendant to comply with the above mentioned conditions; *i. e.*, to issue said two classes of bonds of the amounts mentioned, and to secure payment thereof by conveyances by defendant of all the premises then conveyed to it, and all the property it might acquire in the future, and its income of every character, to themselves as trustees, in trust to sell and convey upon defendant's default in payment, as appears by reference to a copy of said deed herewith filed, marked "M," and made part of this answer.

Defendant was but the creature of the parties so dealing with themselves; the persons selected to act as directors of defendant had no interest in the transaction or the property beyond the trifling amount of five shares each of the stock of defendant, which they purchased at a nominal price at the solicitation of said trustees. Said directors also were persons of no experience in matters of the character stated; and were wholly incompetent to foresee the consequences of the transaction, or that defendant could not meet the obligations it was compelled by its owners and creators to assume. And further, said directors, acting as such only for accommodation of the said bondholders, and seeing that they had fully authorized and empowered said R. K. Dow to act for them, confined themselves to mere formal acts, and did nothing but to carry out the wishes expressed by said Dow and by the articles of organization.

Under these circumstances the completion of the transaction was easy. The parties controlling the whole matter were both vendor and vendee, and could and did dictate their own terms without fear of opposition. Consequently defendant accepted said conveyance upon the terms and conditions thus imposed upon it, and issued and delivered to the said bondholders certificates of its capital stock to the amount of $1,300,000, in and by each of which certificates it acknowledged that the shares therein mentioned were fully
63 paid for, and by which alone it paid full value for all the property conveyed to it by its vendors.

Defendant also executed and delivered to said trustees, Pierson, Matthews, and Dow, its 250 bonds, by each of which it promised at maturity to pay the bearer one thousand dollars with ten per cent. interest thereon from date, and which bonds were divided into five series of fifty each, and which series matured respectively at one, two, three, four, and five years from date; and to secure payment thereof by its deed dated May 1, 1877, conveyed all its property, all it might thereafter acquire, and all its income of whatever nature and however derived, to said Pierson, Matthews, and Dow, in trust to sell and convey upon its default, as appears by a copy thereof herewith filed, marked "N," and made a part of this answer.

On the second day of May, 1877, defendant still being under sole and exclusive control of said bondholders, and of said Pierson, Matthews, and Dow, their trustees, executed their 2,575 bonds, by each of which it promised to pay the bearer one thousand dollars, and its one hundred other bonds, by each of which it promised to pay the bearer two hundred and fifty dollars, all said bonds maturing thirty years after date, and bearing interest from the first day of July, 1878, to the first day of July, 1882, at four per centum per annum, and after the latter date until maturity, at eight per centum per annum, for which interest coupons executed by defendant were attached to said bonds. And on same day defendant executed and delivered its deed, being the same deed mentioned in the bill, and upon which relief is sought against defendant, by which it conveyed all the premises it had acquired by the conveyances aforementioned, all the property it might afterwards acquire in any manner, and all its future income, rents, and profits to said Pierson, Matthews, and Dow, in trust to sell and convey on complainant's default; the property thus conveyed being the same mentioned in the
64 bill. That in said deed, at the dictation and by the coercion of said trustees, it was provided that, beginning on January 1, 1883, defendant should, in addition to the exorbitant interest contracted for, pay a large sum annually to said trustees as a sinking fund, to be by them invested in the purchase of said bonds, and that in case of failure or default for sixty days in payment of any installment of interest or of sinking fund said trustees, on request in writing of the holders of one-third in value of said bonds, might and should take possession of all the railroad, charter, and other property conveyed to defendant, and might sell the same; at said sale might purchase for benefit of holders of defendant's said bonds, and should convey all such property to a new corporation to be formed of and

by said bondholders. All of which appears by reference to a copy of said deed herewith filed and marked "O," and made part of this answer. And immediately thereafter defendant, acting under the same dictation and coercion, delivered its last-mentioned 2,675 bonds to said Pierson, Matthews, and Dow, as trustees, to be by them distributed and delivered to defendant's own stockholders.

No account of the distribution of said bonds has ever been rendered by said trustees to defendant. It avers, however, that they delivered said bonds to each of the holders of said railway bonds, stockholders of defendant.

Defendant avers that it received no consideration whatever for any of its last-mentioned bonds, and that no person who received or retained any of such bonds paid to it anything therefor. It avers and states that no moneys for said bonds, or for any of them, was paid to defendant, or to any one for its use, and also says that none of said bonds were sold for money or any other value, nor were the said bonds, or any of them, issued by defendant either for money or property received by it or for labor done.

It also avers that its only power to execute bonds or to mort-
65 gage its property was and is contained in section 9 of its charter, the material part of which section is as follows:

"The said company may, at any time, increase its capital to a sum sufficient to complete the said road and stock it with everything necessary to give it full operation and effect, either by opening books for new stock or by borrowing money on the credit of the company and on the mortgage of its charter and works, and the manner in which the same shall be done in either case shall be prescribed by the stockholders at a general meeting," etc.

And it avers that such last-named bonds were issued and deed of mortgage and trust executed and delivered neither to increase its capital nor to borrow money; that, on the contrary, the effect of the execution and delivery of said last-named bonds and deed was to decrease the capital of defendant, to make it insolvent from the beginning, and by absorption of its income in payment of interest upon and principal of bonds, for which it received no consideration, to hinder it from repairing and improving its road and equipments, and thus to hinder and embarrass it in the operation of its road and in the discharge of its duty to the public and to its stockholders.

Each person who took one of said bonds knew at the time that in taking from defendant stock to the amount of $1,300,000, and the last-named bonds for and to the amount of $2,600,000, they were taking and receiving from defendant its obligations for more than three times the value of the property sold and conveyed to it, and also knew that the said bonds had no valuable consideration whatever. Defendant avers that said stock and bonds were issued and distributed at one and the same time, and as part of the same transaction, and that defendant received no consideration of value whatever for the said bonds, and that they were issued with a view to distribute the same among its own stockholders as a gift or without consideration then paid, or given or agreed to be paid or given;

66 and the said bonds were in fact so distributed and given to its stockholders. And it avers that all said bonds are now held by complainants themselves, and by persons who were stockholders of defendant at the time of their issue, and who participated in the whole transaction.

Said 13,000 shares of stock are now outstanding in the hands of *bona fide* purchasers and owners for value; and this defendant is bound thereby, and the same constitute a liability on defendant which it cannot deny or escape; and said trustees having issued and declared said stock to be full paid stock, defendant is estopped to deny such fact in favor of *bona fide* purchasers thereof for value, without notice.

Defendant further states that shortly after the execution of said deed of May 2, 1877, and of the said bonds secured thereby, the said R. K. Dow, was elected its president, and except for a short time continued president thereof, and controlled defendant up to February 15, 1881. While he was so president and in control of defendant, it paid the interest accruing on its said bonds, and since Dow ceased to be its president, defendant has paid one installment of interest accruing January 1, 1882, upon the bonds secured by said mentioned deed; but it avers that at the time of such last payment the true nature of the proceedings herein detailed was unknown to the then president and directors of defendant.

Wherefore, defendant avers that the said last-named bond issued by it on May 21, 1877, being the same bonds mentioned in the bill of complaint in this cause, and the mortgage or trust deed executed by it on the same day to secure said bonds, being the same deed mentioned in the bill, were and are illegal and void, and that complainants are entitled to no decree against defendant.

It further admits that the said mortgage of May 2, 1877, contained the stipulation printed upon page 7 of the printed copy of 67 the bill of complaint. It also admits that William S. Pierson, one of the trustees, afterwards died, and that the complainant, Charles Moran, was duly and legally appointed trustee of the said mortgage in his stead, and that Moran accepted said trust, and is now acting as trustee.

It also admits that the State of Arkansas filed her bill in the Pulaski chancery court for the foreclosure of the mortgage to the State above referred to, dated January 10, 1861; that the defendant applied to be made a party defendant to the suit, and that it was then in possession of the property mortgaged to the State; that this was granted, and that, upon final hearing, it was decreed that the defendants therein pay to the State the sum mentioned in the complaint. It admits that the defendant appealed to the supreme court of the State of Arkansas, and it was on the fourth day of March, 1882, by that court decreed that unless the sum mentioned in the bill was paid on or before the thirtieth day of March, 1882, the commissioner appointed by the court should sell the property mortgaged to the State by the Memphis and Little Rock Railroad Company for cash.

Respondent here states, however, that the debt due the State of Arkansas was not the debt of this respondent, and that neither in

the decree in the chancery court, nor in the decree rendered by the supreme court in the cause mentioned, was there any decree whatever rendered against this respondent as debtor to the State, the entire proceeding being one *in rem*, and the judgment being that unless the debtor of the State or some one for it paid the said debt, the property mortgaged by the former Memphis and Little Rock Railroad Company to the State should be sold.

Respondent further admits that complainants in this cause did pay off the amount of the decree of the supreme court of Arkansas, rendered against the said property; but avers that they did so
68 without consultation with this defendant, without its request, and without notice to the defendant that they intended to pay the same, and before the day of sale appointed in said decree, up to which time the defendant was entitled to make payment should it see fit to do so.

Respondent further admits all that is stated in the bill with regard to the bill filed on the chancery side of this court by the complainants' setting up their payment made to the State of Arkansas, and praying subrogation; and all that is stated as to the answer and cross-bill filed thereto. It also admits that a decree was rendered on the twelfth day of May 1883, in the suit last-named, by this court granting the relief prayed by the bill, and dismissing respondent's cross-bill; but they deny that the decree remains in this court in full force, because they say that this respondent appealed therefrom to the Supreme Court of the United States, and in apt time executed its supersedeas bond by which said decree was superseded, and that the same is now pending in the Supreme Court of the United States.

Respondent, further answering, admits that in the exercise of what it believes to be its legal rights, under the advice of counsel, it filed in the circuit court of the United States for the southern district of New York its bill against complainants in this cause, and others, in which it set up the same matters stated in its said cross-bill, and prayed the same relief. And it further admits that said suit was heard, and that on the eleventh day of February, 1884, the bill of the defendant herein was dismissed for want of equity, from which decree of the said circuit court for the southern district of New York the defendant intends in apt time to prosecute its appeal to the Supreme Court of the United States. Respondent admits that in its answer and cross-bill filed in New York it did allege that the property covered by its mortgage of May 2, 1877, was of less value than the amount of the bonds secured thereby, and
69 the prior liens upon said property.

It further admits that attached to the said bonds secured by the mortgage of May 2, 1877, are coupons for the semi-annual interest thereon to the time of maturity of said bonds at the rate of eight per centum per annum, payable on the first days of January and July in each year. It admits that it has not paid the coupons which were originally attached to said bonds, and which fell due July 1, 1882, or those that have matured since that time; but it denies that it has made such failure with the intention of defrauding

any one, or that it made any false pretense whatever with regard thereto. And while respondent has failed to pay the sums which were mentioned in the coupons originally attached to the said bonds when issued, and which matured on July 1, 1882, January 1, 1883, July 1, 1883, and January 1, 1884, it does not know or believe that it has committed any default, which under the provisions of the mortgage aforesaid is a forfeiture thereof, or which entitles the complainant to enter and take possession of its property, or to ask a foreclosure of the said mortgage, because it says that in and by the said mortgage it is expressly stipulated that no coupon shall be entitled to the security of said deed of trust or mortgage unless such coupon is held and owned by the actual owner and holder of the bond to which said coupon was attached at the issue of said bond. The exact language of the mortgage in this respect is as follows:

"And it is expressly agreed that such coupons as may be held by any other person than the actual owner or holder of the bonds to which they were respectively originally attached shall be considered merely as an unsecured promissory note of said railroad company, and shall not be entitled to the security of this deed of trust."

Respondent knows that a very large number of suits have been brought and judgments recovered against it in this court upon coupons which were originally attached to said mortgage bonds,
70 which said coupons were necessarily for the purposes of said suits and judgments detached from said bonds; and it is not shown by the complaint in this cause, or in any other way, that the bonds from which such coupons were detached have not been sold, and are not now held and owned by parties other than the owners of the said bonds, nor is it known by this defendant that the coupons attached to any of the bonds are not now held by parties who are not the owners of the bonds themselves. And defendant says that it being a part of its original contract that any detached coupon not held by the actual holder and owner of the bonds shall be considered merely as an unsecured promissory note of this defendant, and shall not be entitled to the security of its deed of trust, it is the duty of those who may desire to enforce said mortgage to show that the coupons for the non-payment of which they are proceeding are held by the holders and owners of the bonds to which they were originally respectively attached, and it is the right and duty of this defendant under its contract, and for the protection of itself and the protection of the actual holders and owners of its bonds, to require strict proof of the ownership of the coupons which have been unpaid. And it asks and demands that such strict proof be required, and that until it is made, no decree whatever may be rendered in favor of the complainants. Having made this contract with those who have taken its bonds, and the contract having been largely for the protection of the bondholders, respondent would be derelict in its duty if it did not insist upon full and strict proof of the ownership of said coupons. And no such proof having been furnished it by the complainants, and respondents having no sufficient knowledge or information upon which it can found a belief as to the true ownership of the said coupons, it de-

nies that the said coupons which it has left unpaid are held by or belong to the parties who own the bonds to which said coupons were respectively attached at the time of their issue by this defendant.

71 Further answering, respondent admits that on the twenty-fourth day of June, 1882, it confessed judgment in this court in favor of Russell Sage, for the sum of $125,921.43; but the defendant denies that the said Russell Sage individually is a large owner of defendant's stock. It says that the said Russell Sage, individually and personally, has not a single share of stock in this company. It says that largely over 13,000 shares of its capital stock are held by Jay Gould, Russell Sage, and Henry G. Marquand, as trustees, and in no other manner; and that the said Russell Sage owns none individually.

Defendant further says that the debt in which it confessed judgment in favor of said Russell Sage was honest and just; that the consideration was for money borrowed by this defendant for its use, and a part of which was applied to the payment of the coupons attached to the said bonds May 2, 1877, which matured on the first day of January, 1881, and the rest and residue was for money borrowed to pay debts contracted by this company when under the management of the complainant, R. K. Dow, and which this defendant was compelled to pay.

It admits that on the same day Sage filed his complaint in the Pulaski chancery court, praying for the appointment of a receiver to take charge of the property of the defendant, and operate it for the payment of the Sage judgment out of its net earnings; the defendant entered its appearance, and making no objection, the receiver was by the court appointed. But it denies positively and emphatically each and every allegation in the complaint that the said suit between the said Sage and the defendant was collusive, and was begun to avoid the payment of the debts of this defendant, or that it was begun to avoid the payment of the interest on the bonds mentioned in this complaint.

72 It admits that the cause of Russell Sage against the defendant was removed to this court, but expressly alleges and shows that it was so removed by this defendant itself.

Defendant admits that the receiver was continued in that cause till the thirty-first day of December, 1883, when he was discharged by this court of its own motion.

Defendant admits that the Hon. George W. McCrary, in his opinion rendered, alleged that the said Sage suit was collusive; but denies that he had any sufficient proof of any such allegation, and avers that by the after proceeding in this court in that cause it was shown that no such sufficient proof was before the said judge, because it says that on —— day of February, 1884, a reference was made by this court to a master to take testimony and report whether or not said suit was collusive. Such reference has not been completed, nor has the said report been made, nor this court had an opportunity to pass thereon.

Further answering, respondent denies that on the appointment of

this receiver the directors of the defendant or its officers resigned either for the purpose of avoiding the payment of its debts or with the intent to prevent the service of process on this defendant. Respondent says that at the election for directors held on the 15th day of February, 1882, F. A. Marquand, E. K. Sibley, Thomas Essex, Jay Gould, and B. C. Brown were elected directors of the said company; that the said Jay Gould resigned on the 29th day of April, 1882, and that at a meeting of the directors held on the 6th day of May, 1882, R. S. Hays was elected a director in his stead; that B. C. Brown resigned by a letter addressed to the president, F. A. Marquand, May, 7, 1882, which resignation was by the said president accepted. Respondent further says that the aid E. K. Sibley, having been appointed receiver as aforesaid, and being advised that his duties as director and receiver might come into conflict, resigned the positions of director and general manager of this defendant on the 27th day of June, 1882, and that neither the president, F. A.
73 Marquand, nor the directors, Thomas Essex and R. S. Hays, resigned, but continued to hold their offices; that at the election held on the 15th day of February, 1883, R. S. Hayes, Thomas Essex, John C. Brown, D. S. H. Smith, and J. W. Wynne were elected directors and held their offices during that year and up to February, 15, 1884, at which time they were all again elected and have since held their offices as directors; that R. S. Hayes was elected president by the directors immediately after the 15th of February, 1883; was again elected president after the election of directors in 1884, and has been president of the defendant since his election, about the 16th day of February, 1883; and further states that neither did its secretary and treasurer resign, nor did its superintendent and chief engineer resign his office, but they continued to hold the same. And it says positively that the allegation is wholly untrue.

It denies that the object of the said defendant in procuring the appointment of a receiver was to avoid the enforcement of the coupouns attached to the said mortgage bonds, or to depreciate the value of the bonds in the market, and it says that the records of this court show that the appointment of the receiver did not in the least prevent the enforcement of any of said coupons or the bringing of any suit for the collection thereof, as shown by the bill itself in the immediately succeeding allegation that the holders of a large number of coupons have sued upon them and obtained judgments at law in this court, and that the plaintiffs in said judgments have filed bills on the chancery side of this court praying that the liens of their said judgments may be foreclosed and the property of the defendant sold for the payment of each of their said judgments, or for the appointment of a receiver.

Respondent further admits that on the 10th day of April, 1883, the Equitable Life Assurance Society and others filed a bill alleging that they were the holders of bonds secured by the preference
74 mortgage executed by the defendant company May 1, 1877, upon which default had been made, asking that a receiver might be appointed and that the said last-named mortgage may be foreclosed for their benefit, but most positively denies that the plaintiffs in that

suit are acting in collusion with the defendant company. It admits that it filed its answer to the bill filed by the said Equitable Life Assurance Society, which answer contained the statement upon page 14 of the printed copy of complainants' bill, and that said suit is still pending. It admits that R. K. Dow and Watson Matthews, two of the complainants herein, who were the trustees of the said mortgage of May 1, 1877, have filed a bill on the chancery side of this court praying foreclosure of the said mortgage of May 1, 1877; that upon the last rule day they took a decree *pro confesso*, which has not yet been perfected, and that the said suit is still pending.

Respondent most positively denies that it has been able to pay the interest upon the coupons which it has failed to pay and at the same time to operate its road and make the necessary repairs and betterments, and it denies that its net receipts have been, since its default in payment of coupons, $400,000, or anywhere near that amount.

Further answering, respondent denies that any of its officers have ever said that if the owners and holders of the bonds and coupons of May 2, 1877, would not accept such compromise as the defendant might dictate they would make all they could out of the road, run it down, and abandon it in a ruinous condition to the holders of the said bonds and coupons. Respondent has filed herein the affidavits of each of its officers most positively denying that they have ever made any such or like statements, and it now here positively alleges and states that such allegation is false and untrue in every respect and particular.

Respondent itself believes that its property is not worth the amount of overdue and unpaid interest interest upon said coupons, the principal of the $2,600,000 of bonds of May 2, 1877, and
75 and the principal of the bonds of May 1, 1877, and the decree for money paid to the State of Arkansas, and it says that this load of indebtedness has been loaded upon it by the complainants themselves, and that if the defendant is in any default such default has been caused by their action.

Further answering, respondent says that the said mortgage contained the following specific provision:

"Fifth. In case default for the space of sixty days shall be made in the payment of any of said interest coupons or in the payment of the principal sum of any of said bonds as they shall respectively fall due, the said party of the second part, their successor or successors, and his or their survivor or survivors, on the written request of one-third in interest of the holders of the said bonds, by themselves or by their agents thereto duly authorized, either of said trustees being competent to act as the agent of the other trustees, upon being furnished with funds for expenses and being suitably indemnified against loss, may and shall enter in and upon and take possession of and operate all and singular the said railroad and all other property, real personal, and mixed, hereinafter conveyed or intended to be conveyed, and take and receive the income and profits thereof."

And it says that the complainants in this cause have furnished it

with no proof that any such number of the holders of the bonds described by the said mortgage deed have requested them in writing or otherwise to demand or take possession of the property in said deed mentioned.

And it further says that no demand whatever has been made upon it either before or since the commencement of this suit by complainants for the surrender of the said property.

Defendant further states that in the cause hereinbefore mentioned, in which Pierson and Matthews as trustees of the mortgage executed by defendant on the first day of May, 1877, called the preference mortgage, and which mortgage is prior in lien to the mort-
76 gage sought to be enforced in this cause, a decree was rendered by this court on the 4th day of April, 1884, in accordance with the prayer of the bill, in and by which decree it was ordered that the defendant pay the sum found to be due upon its said preference bonds within thirty days, and, upon defendant's failure to do so, its property should be sold and conveyed by a commissioner appointed for that purpose in said decree; and defendant says that to take possession of the property at this time, and deliver it either to a receiver or to complainants, would render it wholly unable to prevent the sale of this property under said decree, and would amount to a confiscation of its whole property.

And having fully answered, the defendant doth demur to said bill, and for cause of demurrer says:

1. That the complainants have not stated a case sufficient to entitle them to the relief sought or to any part thereof.

2. That the bill does not show that the coupons left unpaid by the defendant belong to and are held by the owners of the bonds to which they were attached when issued.

3. That the bill does not show or allege that the complainants have been requested, by one-third in value of the bonds secured by the said mortgage deed, to demand or take possession of the property in said complaint mentioned, or of any part thereof.

4. That the trustees of the mortgage executed by this defendant on the 1st day of May, 1877, upon the same property, and which is a prior lien to the said mortgage executed May 2, 1877, are necessarily parties to this cause, and are not made parties hereto.

5. There is no equity in the bill.

Wherefore, etc.

R. S. HAYS,
President of the Memphis and Little Rock R. R. Co., as reorganized,
By JOHN C. BROWN,
Attorney for him and said Company.

JOHN C. BROWN,
B. C. BROWN,
Of Counsel.

77 In testimony that the foregoing is the answer of the Memphis and Little Rock Railroad Company, as reorganized, to the bill of complaint filed against it in the above-mentioned cause,

I hereby attach the seal of said company, this 7th day of April, 1884.

JOHN W. GOODWIN,
Secretary.

78 And on the 8th day of April, 1884, the following proceedings were had:

Come said plaintiffs, by U. M. & G. B. Rose, Esqs., their solicitors, and file herein their exceptions to the answer of said defendant.

79 On the 15th day of April, 1884, the following proceedings were had:

Now on this day come said plaintiffs, by U. M. and G. B. Rose, their solicitors, and also comes said defendant, by John C. Brown and B. C. Brown, its solicitors, and the applications of the plaintiffs' for the appointment of a receiver herein having been duly considered and the court being now fully advised in the premises, it is now ordered that Rudolph Fink be and he is appointed a receiver of this court, and he is directed to give a bond as such to the defendant in the penal sum of five hundred thousand dollars, with sureties to be approved by the court, conditioned that he will faithfully discharge the duties of receiver in this action and that he will obey the orders of the court herein, and to take and subscribe an oath that he will faithfully discharge his duties as such receiver, and immediately thereafter he shall take possession of the Memphis and Little Rock railroad, with its inclines, connections, track, depots, rolling stock, books, papers, moneys, and all and singular its property of every kind, character, and description, and he shall operate the same subject to the orders of this court. It is therefore ordered that the defendant at once surrender possession of its said railroad, rolling stock, and all other money and property of every character to said receiver, and that said receiver shall operate the same as railroad in the usual manner in its proper business of carriage of freights, express matter, and passengers; that he keep accounts of all receipts and expenses and make report thereof, and of all his acts
80 and doings to this court as may be by order required.

And it is further ordered that as soon as may be said receiver do make and file with the clerk of this court a true and complete inventory of all and singular the property of said company, real, personal, and mixed, which has or may come into his hands, possession, or control as receiver of this court.

And it is further ordered that said receiver shall continue the operation of the railroad in the ordinary and usual course as the same is now operated in the common carriage of freight and passengers, having due regard to the public interests and the accommodation of the public, and keeping the premises and property, both real and personal, in repair, to the end that the said road may be efficiently operated with safety and convenience to the public. To the same end he shall from time to time employ and discharge all needful labor, servants, and agents, and shall purchase and pay for all

needful labor and supplies as may seem to be necessary and proper in the exercise of a sound discretion, and he shall have power to settle and adjust, according to the usual course of business, all outstanding traffic balances with other railroads, steamboats, and telegraph companies, and to settle and adjust such like balance as may hereafter from time to time arise, and he shall have power to make and abrogate as usual necessary and proper agreements for the interchange of business in the way of traffic, and to continue or abrogate existing arrangements of the like kind, and to continue existing and to make new and proper arrangements for the transfer of freight and passenger cars over and across the Mississippi to and from Tennessee, and generally to do and to perform all things usual and proper, according to the rules and usages of good railroad management, to increase the business of the road and to promote the convenience of the public.

81 And it is further ordered that said receiver shall have power, at his discretion, to prosecute and defend all existing actions by or against said company, and to pay or defray the usual or ordinary expenses incident thereto, and to commence and prosecute any action which in the usual course of business he may deem necessary to commence hereafter, either in the name of the said company or in his own name as such receiver, as he may be advised, and to defend any and all suits that may hereafter be brought against said company or against himself as receiver by permission of this court, and to defray the necessary and proper expenses of such proper prosecutions and defense, including reasonable fees of counsel employed for that purpose, and may pay the same salaries which have been paid by the defendant, or otherwise, at his discretion, and he is also empowered to sue for, collect, receive, and receipt for all monies due from the Government of the United States to said company, and to pay all the expenses incurred in the adjustment and collection of said demands.

And he is authorized and empowered to collect and convert any of the notes, bonds, or other securities payable to said railroad company which may come into his hands, and to pledge or hypothecate the same to secure payment of any moneys borrowed by him by leave of this court; to pay, at his discretion, all liens existing on the depots and depot buildings used about the business of said railroad in this State or at Memphis, Tennessee, and to pay all due and unpaid purchase-money of locomotives or other rolling stock used on said road, if the same can be discharged out of the earnings of the road; and he is further authorized to contract for or obtain and use all rights of way over or across lands or other railways in the State or elsewhere which, in his judgment, are necessary for the due and profitable operation of the said railroad, and to pay all sums of money necessary to obtain and operate the same.

82 And it is further ordered that said receiver, acting in good faith and with ordinary prudence and care in the management of said business, shall not be answerable in his individual right for any breach of contract entered into by him, or pay for any injury to any person or for any property, or to any person by any

accident occurring in the management or operation of said railroad, or by its business, or by or through the negligence or misconduct of any person employed by him, nor acting in good faith and with ordinary prudence and care shall he be liable for any default, theft, or embezzlement of any person employed by him.

And it being shown that some part of the property hereby placed in the hands of the receiver is situated in Memphis, Tennessee, and that, in the conduct of the business of said company, other portions of such property must be sent into the State of Tennessee, and that many sums of money must necessarily become due to said receiver from persons and corporate bodies doing business in said State of Tennessee, and that there is danger that possession thereof by said receiver may be disturbed by many vexatious suits in the courts of said State, said receiver is hereby authorized and empowered, should in his judgment there shall be necessity therefor, to apply by petition or bill to any court of Tennessee to be appointed receiver of that court of all such property, with leave, however, to pass all his accounts as receiver before this court.

And said receiver is further authorized to offer and pay a sufficient reward for the detection and conviction of all persons who have injured, or may hereafter injure, said railroad or interrupt and damage the trains thereof, and to employ counsel and prosecute such persons.

83 And it is further ordered that said receiver make sale of any lands held by the defendant for sale at the price fixed by said defendant, and that he convey the same to purchasers, and his conveyances of said lands shall transfer to said purchasers all the right, title, and interest of all the parties to this suit.

And it is further ordered, first, that debts, if any, due from the railroad company for tickets and freight balances and for work and labor performed by its employees and laborers and supplies and materials furnished for operating, repairing, or improving the road and all obligations incurred in the transportation of passengers and freight, or for injuries to persons or property, which have occurred within six months last past, shall be paid out of the earnings of the road.

Second. That persons having demands or claims of any character against the receiver may, without applying to the court for leave to do so, sue in any court of this State having jurisdiction, or may file their petition and have their claims adjusted in this court at their election.

This clause shall not be construed as authorizing the levy of any writ of process on the property in the hands of the receiver or taking the same from his possession.

Third. That the debts and liabilities of the railroad company which the receiver is ordered to pay, together with all the debts and liabilities which said receiver may incur in operating said road, including claims for injuries to persons and property, shall constitute a lien on said road paramount to the lien of the mortgages set out on the plaintiffs' bill, and said lien shall continue until said debt and liabilities are satisfied; and the discharge of said property from

the custody of the receiver shall not affect such lien or de-
84 prive claimants of the opportunity of proving their demands, but said receiver shall remain in office for the adjustment of such demands, and may be sued therefor; and [if] said demands are not paid by the person or corporation in possession of said mortgaged property, the court may retake such property into its possession and operate it by a receiver until said debts are paid, or may decree the sale of the property as shall seem most expedient. Said receiver shall file monthly reports in the master's office of all his acts as such, and said master shall examine said reports and report to the court upon the same. And said receiver has leave to apply to the court at any time for further directions.

85 And on April 16, 1884, the following proceedings were had:

Comes the defendant, by B. C. Brown, Esq., its solicitor, and files herein its motion to correct the decree herein.

Which motion is in words and figures as follows:

86 In the Circuit Court of the United States for the Eastern District of Arkansas.

R. K. Dow, Watson Matthews, and Charles Moran, as Trustees, Compl'ts,
v.
The Memphis and Little Rock Railroad Company, as reorganized, Defendant.

The defendant comes and excepts to so much of the order or decree appointing a receiver in this case as directs the said receiver to take and the defendant to deliver to said receiver the moneys in its possession, and shows to the court that all the money in its hands or possession was derived by it from the operation of the railroad and other property mentioned in the bill, and was its income and the income of said property, and that it has no money whatever, save such as were thus derived and received. And it further shows that at no time whatever have said plaintiffs ever demanded of defendant possession of the property in said mortgage mentioned, or of any part of such property.

Wherefore defendant moves the court to strike from said order so much thereof as requires or directs defendant to deliver to the receiver its money on hand.

B. C. BROWN,
For Def't.

B. C. Brown, being sworn, says: That he is the attorney for the defendant, and that he believes that the facts stated in the foregoing motion are true.

——— ———.

Subscribed and sworn to before me, this 16th day of April, 1884.

——— ———.

Endorsed: Filed April 16, 1884. Ralph L. Goodrich, clerk.

87 And on April 18, 1884, the following proceedings were had:

And on this day come plaintiffs, by U. M. & G. B. Rose, their counsel, and defendant, by B. C. Brown, its counsel, and the court not being sufficiently advised as to what judgment to render upon the motion of defendant to modify the order heretofore made in this cause appointing a receiver by striking therefrom all words which authorize the receiver to take, or require defendant to deliver, the moneys in its possession derived from the operation of the mortgaged property, doth take the same under advisement; and it is ordered that defendant deliver said moneys to the receiver, to be held by him subject to the order of the court, and to be repaid to defendant should the court so adjudge.

88 And on April 18, 1884, the following proceedings were had:

On this day came said plaintiffs, by U. M. & G. B. Rose, their solicitors, and also came the said defendant, by B. C. Brown, its solicitor, and also came Rudolph Fink, appointed receiver herein, and executed his bond as such, with R. K. Dow as surety, which bond is approved by the court and is ordered to be filed; and said receiver also made and files herein in open court his oath of office as such receiver, such bond and oath being in words as follows:

In the United States Circuit Court for the Eastern District of Arkansas.

R. K. Dow, Watson Matthews, and Charles Moran, Plaintiffs,
v.
The Memphis and Little Rock Railroad Company, as reorganized, Defendant.

Know all men by these presents, that we, Rudolph Fink, as principal, and Robert K. Dow, as surety, are held and firmly bound to the Memphis and Little Rock Railroad Company, as reorganized, in the just and full sum of five hundred thousand dollars; said obligation is on condition that whereas said Fink has been appointed receiver in chancery in the above-named cause:

Now, if said Fink shall faithfully discharge the duties of receiver in said cause, and shall obey the orders of the court in said cause then said obligation shall be null and void; else, in full force and virtue.

Witness our hands, on this 19th day of April, 1884.

RUDOLPH FINK.
R. K. DOW.

89 United States of America, *Eastern District of Arkansas:*

I, R. K. Dow, say that after payment of all my just debts, and setting aside property exempt from execution, I am worth more than the sum of five hundred thousand dollars.

R. K. DOW.

Sworn to and subscribed before me, on this 19th day of April, 1884.

RALPH L. GOODRICH, *Clerk.*

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

I, Rudolph Fink, do solemnly swear that I will faithfully perform my duties as receiver in the above-named cause.

RUDOLPH FINK.

Sworn to and subscribed before me, this 19th day of April, 1884.

RALPH L. GOODRICH, *Clerk.*

And now, having duly qualified, said receiver is directed to obey the orders heretofore made in this cause for his action.

90 And on the 21st day of April, 1884, the following proceedings were had:

Now on this day came Rudolph Fink, receiver herein, and files his bond as such receiver, which is in words and figures as follows:

Bond.

Know all men by these presents, that we, Rudolph Fink, as principal, and Frederick H. Cossitt, Charles Moran, R. K. Dow, and Albert Fink, as sureties, are held and firmly bound unto the Memphis and Little Rock Railroad Company, as reorganized, in the sum of five hundred thousand dollars. Witness our hands, on this 18th day of April, 1884. The condition of the above obligation is such, that whereas the said Fink has been appointed receiver in chancery in a certain cause now pending in the United States court for the eastern district of Arkansas, wherein Robert K. Dow, Watson Matthews, and Charles Moran are plaintiffs, and said railroad company is defendant: Now, if said Fink shall faithfully discharge the duties of receiver in said suit, then the above obligation shall be null and void; otherwise, it shall remain in full force.

RUDOLPH FINK.
F. H. COSSITT.
CHARLES MORAN.
R. K. DOW.
ALBERT FINK.

Signed in the presence of—
ARTHUR Y. CASSONOVA.

91 STATE OF NEW YORK, *City and County of New York:*

On this 19th day of April, A. D. one thousand eight hundred and eighty-four, before me personally came Frederick H. Cossitt and Charles Moran, to me personally well known, and known to be two of the individuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

Witness my hand and seal, the day and year first above written.

[L. S.] ARTHUR Y. CASONOVA,
Notary Public, New York County.

Justifications.

STATE OF NEW YORK, }
County and City of New York, } *ss:*

On this day came before me, a notary public for said county and city, Frederick H. Cossitt, who, being by me duly sworn, made oath that after the payment of all his just debts, and setting aside property exempt from execution, he is worth more than the sum of five hundred thousand dollars.

F. H. COSSITT.

Sworn to and subscribed before me. Witness my hand and seal of office, this 18th day of April, 1884.

ARTHUR Y. CASONOVA,
Notary Public, New York County.

STATE OF NEW YORK, }
County and City of New York, } *ss:*

On this day came before me, a notary public for said county and city, Charles Moran, who, being by me duly sworn, made oath that after the payment of all his just debts, and setting aside property exempt from execution, he is worth more than the sum of
92 two hundred thousand dollars.

CHARLES MORAN.

Subscribed and sworn to before me. Witness my hand and seal of office on this 18th day of April, 1884.

[L. S.] ARTHUR Y. CASONOVA,
Notary Public, New York County.

STATE OF NEW YORK, *County and City of New York:*

On this day came before me, a notary public for said county and city, James E. Doty, Albert Fink, who, being by me duly sworn, made oath that after the payment of all his just debts, and setting aside property exempt from execution, he is worth more than the sum of one hundred thousand dollars.

ALBERT FINK.

Sworn to and subscribed before me. Witness my hand and seal of office on this —— day of April, 1884.

[L. S.] JAMES E. DOTY,
Notary Public, Kings and New York Counties.

On this 18th day of April, 1884, personally appeared before me Albert Fink, to me known, and known to me to be the person described in and who executed the foregoing bond, and he acknowledged that he executed the same.

[L. S.] JAMES E. DOTY,
Notary Public, Kings & New York Counties.

93 Said bond is approved by the court, and is ordered to stand in place of the bond previously filed by said receiver.

94 And on May 5, 1844, the following proceedings were had:

Come the complainants, by U. M. & G. B. Rose, Esqs., and file herein their replication to defendant's answer; also comes F. H. Cossitt, W. G. Wheeler, Charles Moran, William Clark, R. K. Dow, A. D. Juilliard, H. M. Juilliard, E. C. Stokes, George Dow, and Martha L. Dow, by said attorneys, and file herein their intervention for fund in receiver's hands.

Which intervention is in words and figures as follows:

95 In the United States Circuit Court for the Eastern District of Arkansas.

R. K. Dow *et als.*
v.
Memphis and Little Rock Railroad Company.

Comes here F. H. Cossitt, and begs leave to intervene herein for his own interest, and to participate in the fund in court in this cause, and respectfully shows as follows:

On the first day of May, 1877, the said defendant executed its mortgage of that date to William S. Pierson, R. K. Dow, and Watson Matthews, by which it conveyed to them its road and all of its property and income of every kind then owned or afterwards to be acquired by said company, in order to secure payment of certain bonds amounting in all to $250,000, and the interest to accrue thereon, a copy of which mortgage is herewith filed, marked Exhibit A, and made a part hereof. Said mortgage creates a first mortgage lien on said property.

96 On the 10th day of November, 1883, the petitioner recovered judgment in this court against said defendant for $9,461.55, for principal and interest accrued on said bonds.

Wherefore petitioner prays that his said judgment, and the costs therein adjudged, may be paid to him out of said fund, and for all other proper relief.

U. M. & G. B. ROSE,
For Petitioner.

97 On July 15, 1884, the following proceedings were had:

Come the plaintiffs, by U. M. & G. B. Rose, their attorneys, and the defendant, by B. C. Brown and John M. Rose, its attorneys, and the motion of said defendant to modify the order of the court appointing a receiver herein by striking therefrom so much thereof as reqires the defendant to pay over to the receiver its moneys on hand and the moneys derived from the income and earnings of said road on hand at the date of said order, and also to require the receiver to pay over to said defendant said money received by him from the defendant under said order, having been heretofore argued and submitted, and the court being now well and sufficiently advised in the premises:

It is ordered, adjudged, and decreed that said motion be sustained, and that so much of the order appointing the receiver in this cause

as requires the said defendant to pay over to said receiver its moneys on hand and the moneys derived from the income and earnings of its road on hand at the date of said order, be rescinded and *and* for naught held. It is further ordered that the sum of thirty-two thousand two hundred and sixteen dollars and twenty cents paid over by the defendant to said receiver under said order be repaid by said receiver to said defendant, and the said plaintiffs here now in open court pray an appeal from this order and decree to the Supreme Court of the United States, which is allowed, and said receiver will not pay said fund to said defendant until said plaintiffs have had the time allowed by law to file a supersedeas bond herein, the penalty of which is fixed at eight thousand dollars.

98 On July 22, 1884, the following proceedings were had:

Come the said plaintiffs, by U. M. & B. G. Rose, their attorneys, and the said defendant, by John M. Rose, its attorney, and the said plaintiffs file here in court their supersedeas bond on the appeal taken by them from the order and decree of this court, requiring the receiver in this cause to pay to the defendant the sum of thirty-two thousand two hundred and sixteen dollars and twenty cents, which came into the hands of the said receiver under the order of this court appointing him such receiver, being the moneys of the defendants on hand at the date of the order of his appointment, and the said bond is taken and approved by the court to operate as a supersedeas bond and ordered to be filed accordingly.

99 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Now on this day came said plaintiffs, by U. M. & G. B. Rose, their solicitors, and also came said defendant, by B. C. Brown, its solicitor, and this cause came on for final hearing, and the court having duly considered of and concerning the same, and being fully advised of the proper decree to be rendered in this cause:

100 It is now ordered, considered, and decreed that Rudolph Fink, the receiver herein, turn over and deliver to said plaintiffs, as trustees named in a mortgage or deed of trust executed by said defendant to William S. Pierson and to said Matthews and Dow, dated on the second day of May, 1877, all the property therein described; the same being as follows:

All and singular the railroad and rights of way of the defendant, from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden, in the State of Arkansas, to Little Rock, in the county of Pulaski and State of Arkansas, with the connections of the said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad, and any railroad depots and rights of way in the city of Memphis, State of Tennessee, belonging to said defendant railroad company, and all rails, trestles, ties, tracks, side-tracks, switches, depots, stations, buildings, water tanks, machine shops, car houses, engine houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments which said defendant owned at the date of said mortgage, or has

since acquired, or become entitled to in the States of Arkansas and or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock, and also, all and singular, all lands, real estate, property of every kind, real or personal, books of account, records, muniments, and evidences of title, and choses in action which were owned by said defendant at the date of said
101 mortgage, and which have since been acquired by it, and also the charters, franchises, rights, privileges, and immunities, including the right of franchise to be a corporation, which said defendant then possessed or owned, or has acquired in the States of Arkansas or Tennessee, or elsewhere, and also all the rents, income, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said defendant from its railroad or or other property, or in any other way whatever, and that said receiver take from said plaintiffs, their solicitors or attorneys, a receipt for all the property embraced in this decree, in duplicate, one of which duplicates shall be filed in this court.

Said property shall not be turned over by said receiver until after the expiration of ten days from the date of this decree, and in case of an appeal from this decree by said defendant by supersedeas then said property and assets of all kinds shall be and remain in the possession of said receiver pending said appeal. And said property of every kind shall be held by said plaintiffs after they obtain possession thereof, subject to all the terms and conditions contained in said mortgage, and said defendant, with all of its officers, servants, agents, solicitors, and attorneys, are enjoined and restrained from interfering with or disturbing in any way the possession of each and every part and portion of said property hereinabove described by the said plaintiffs and by said receiver, and in case of an appeal from this decree by said defendant, this injunction shall remain and be in force until this cause shall have been heard and determined by the Supreme Court of the United States.

102 And it is further ordered, considered, and decreed that the said defendant pay all the costs of this suit, together with a suitable compensation to the plaintiffs as trustees, and to their solicitors, and a reference is now made to Charles P. Redmond, Esq., master of this court, to ascertain the proper amounts to be allowed to said plaintiffs and to their solicitors, who shall report the same here to this court.

And said receiver shall make out and report his accounts in the master's office by the first Monday in November next. And this cause is reserved for further orders.

And said defendant prays an appeal to the Supreme Court of the United States, which is granted.

103 On August 25, 1884, the following proceedings were had:

On this day came the plaintiffs, by U. M. & G. B. Rose, their attorneys, and Rudolph Fink, receiver herein; and it appearing that said receiver is ready to turn over to said plaintiffs the road of said defendant, and all other property in his custody and control, and such receiver, in pursuance to the decree of this court, passed

on the seventh day of August, 1884, it is ordered that said property and all moneys received from the operation of said road, and sale of land and other property shall be turned over to said trustees, subject to the following conditions contained in the order of this court of the 15th day of April, 1884, appointing said receiver, viz:

That the debts and liabilities of the railroad company which the receiver is ordered to pay, together with all the debts and liabilities which said receiver may incur operating said road, including claims for injuries to persons and property, shall constitute a lien on said road paramount to the lien of the mortgages set out in the plaintiffs' bill, and said lien shall continue until said debts and liabilities are satisfied, and the discharge of said property from the custody of the receiver shall not affect such lien, or deprive claimants of the opportunity of proving their demands, for said receiver shall remain in office for the adjustment of such demands, and may be sued therefor; and if said demands are not paid by the person or corporation in possession of said mortgaged property, the court may retake such property into its possession, and operate it by a receiver, until said debts are paid, or may decree sale of the property, as shall seem most expedient.

The said plaintiffs and said defendant, and all others coming into possession of said road, as purchasers or otherwise, shall be bound to discharge all debts and liabilities mentioned in said order appointing said receiver, and all debts and liabilities for which
104 E. K. Sibley, as receiver of said road, in the cause wherein Russell Sage was plaintiff and said railroad company was defendant, was liable; and a lien is retained on said road [and] any other property to secure the payment of said claims and liabilities, and if the same are not paid, this court reserves the right to repossess itself of said property and operate the same by a receiver until said debts are paid, or sell said property for that purpose.

And said lien is declared to be superior and paramount to all claims and liens represented by the plaintiffs in this case; and, for the purpose of enabling the court to reappoint a receiver and retake into its possession said road and property to compel the payment of said debts, this cause is retained.

And on October 11, 1884, the following proceedings were had:

105 On this day came the parties, by their counsel, U. M. & G. B. Rose, for plaintiffs, and B. C. Brown, for defendant, and file herein their agreement as to the manner in which the transcript of the record in this cause shall be made, and providing for omission of papers, which are mere copies of others inserted in the transcript; which, being read, is by the court approved, and it is ordered that said agreement be made a part of the record and transcript.

106 In the Circuit Court of the United States for the Eastern District of Arkansas. In Equity.

R. K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Plaintiffs,
vs.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Defendant.

For the purpose of lessening the transcript of the record of this cause by the omission of unnecessary and duplicated papers it is agreed and stipulated by the parties hereto as follows:

1. That all orders of the court made after the order appointing the receiver in this cause, and which gave to the receiver special directions as to his duties in particular matters, shall be omitted from the record.

2. That on May 5th, 1884, the motion of defendant to modify the order appointing the receiver, so as to leave in defendant's hands the moneys in its treasury, being pending, F. H. Cossit filed his intervention claiming such money as judgment creditor of defendant, which intervention is copied in the record; that on the same day W. G. Wheeler, who had recovered judgment against defendant for $2,775.73; Charles Moran, who had recovered judgment against defendant for $4,867.72; William Clark, who had recovered judgment against defendant for $4,884.30; R. K. Dow, who had recovered judgment against defendant for $4,528.48; A. D. Juilliard, who had recovered judgment against defendant for $4,626.75; H. M. Juilliard, who had recovered judgment against defendant for $4,723.52; E. C.
107 Stokes, who had recovered judgment against defendant for $4,626.75; George Dow, who had recovered judgment against defendant for $4,723.52; and Martha L. Dow, who had recovered judgments against defendant for $4,625.25, also filed interventions which, except as [to] amounts, were all of the same tenor and effect of the interventions files by said Cossit, and it is agreed that the intervention filed by all said last-named parties may be omitted from the record without prejudice to either party, and that the intervention of said Cossit shall stand for all; and it is further agreed that all said judgments were rendered on the law side of this court on the same day, and that all were based upon coupons taken from defendant's bonds secured by its mortgage deed of May 2, 1877.

3. That on the appeal taken by the plaintiffs from the order of the court adjudging that the receiver return to defendant the money in its treasury at the time of his appointment, said plaintiffs gave supersedeas bond in the sum required by the court with F. H. Cossit as surety, which bond has been mislaid by the clerk, and it agreed that this agreement shall stand as and in place and stead of said bond and that neither party shall be prejudiced by its omission from the transcript of the record.

B. C. BROWN,
Sol'r for Defendant.
U. M. & G. B. ROSE,
Sol's for Intervenors and Plaintiff.

Endorsed: Filed this 11th day of October, 1884. Ralph L. Goodrich, clerk, by W. W. Field, deputy clerk.

108 UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

I Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the original remaining of record in my office.

In witness whereof, I have hereunto set my hand and the seal of said court, this 13th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and ninth.

Attest: [SEAL.] RALPH L. GOODRICH, *Clerk,*
By W. P. FEILD, *D. C.*

Endorsed on cover: E. Arkansas C. C. U. S. No. 1120. The Memphis & Little Rock Railroad Company (as reorganized), appellant, *vs.* Robert K. Dow, Watson Matthews, and Charles Moran, trustees. Filed 18th October, 1884. No. 1184. Robert K. Dow, Watson Matthews, and Charles Moran, trustees, appellants, *vs.* The Memphis & Little Rock Railroad Company (as reorganized). Filed October 30th, 1884.

124-65

124-652

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~120~~ 725 ~~109~~ 125

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (AS REORGANIZED), APPELLANT,

vs.

ROBERT K. DOW, WATSON MATTHEWS, AND CHARLES MORAN, TRUSTEES.

No. ~~164~~ 772 ~~151~~ 165

ROBERT K. DOW, WATSON MATTHEWS, AND CHARLES MORAN, TRUSTEES, APPELLANTS,

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (AS REORGANZIED.)

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED MARCH 14, 1885.

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R. K. Dow *et al.*, Trustees, }
v. } 1120.
M. & L. R. R. Co. }

Charter of the Memphis and Little Rock Railroad Company.

An act to incorporate the Little Rock Plank or Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Arkansas, That for the purpose of establishing communication by railroad between the city of Memphis, in the State of Tennessee, and Little Rock, in the State of Arkansas, the formation of a company is hereby authorized, which, when formed, shall be a body corporate, by the name and style of the Memphis and Little Rock Railroad Company, and by said corporate name may and shall be capable in law to buy, receive by gift, hold, sell, and convey real and personal estate, make contracts, sue and be sued, make by-laws, and do all lawful acts properly incident to a corporation, and necessary and proper to the transaction of the business for which it is incorporated; to have and use a common seal and alter the same at pleasure, and shall have perpetual succession of its members.

2 SEC. 2. That William A. Jones, Edward Malany, George W. Beaseley, Samuel McCurdy, James S. Izard, John McDaniel, Carter J. Bernard, and James D. Nilcomb are appointed commissioners, any number of whom, not less than three, may open books at such time and place as they may designate, first giving twenty days' notice in some newspaper, in the cities of Memphis and Little Rock, of the time and place of opening such books, and that Samuel Tate, Thomas Peters, Samuel P. Walker, R. C. Brinkley, D. Leatherman, and James A. Carnes, or any three of them, may, and they are hereby authorized to, open books for subscription of stock to said company in the city of Memphis on the same conditions as prescribed for the opening of books in this State.

SEC. 3. That said commissioners may keep the books open for four days, and if at the expiration of the four days the sum of four hundred thousand dollars shall have been subscribed the commissioners shall make publication of the fact in a newspaper published in Memphis and Little Rock, calling on the stockholders to meet at some early and convenient time, at the residence of Wm. A. Jones, on St. Francis river, for the purpose of organizing said company by the election of a board of directors, as hereinafter provided.

SEC. 4. The capital stock of said Memphis and Little Rock Railroad Company shall be four hundred thousand dollars, and may be increased to two millions at the pleasure of the company. Said capital stock shall be divided into shares of one hundred dollars each, and each share of stock shall be entitled to one vote in the election of directors.

SEC. 5. At the first meeting of the stockholders they shall, under the direction of three or more of the commissioners provided for in

this act, proceed to the election of a board of directors, to consist of five persons, who shall be stockholders, three of whom shall constitute a quorum for the transaction of business. The board of directors shall choose from their number a president in such manner as those present may agree, and may appoint a secretary and treasurer, and any other officer or agent that may be deemed necessary for the transaction of the business of said company.

SEC. 6. The board of directors of this charter shall hold their offices for twelve months from the date of the election, or until their successors shall be chosen; and shall have the power to fill any vacancy that may occur, and in the absence of the president may appoint a president *pro tem.* The said company shall have the exclusive right of transportation or conveyance of persons, goods, merchandise, or produce over said railroad by them to be constructed: Provided, That the charge of transportation and conveyance shall not exceed seventy-five cents per hundred pounds on heavy articles and fifteen cents per cubic foot on articles of measurement for every hundred miles, and in like proportion for a shorter distance, and five cents a mile for every passenger: And provided also, That the said company may, when they see fit, farm out their right of transportation on said road, subject to the rates above mentioned.

SEC. 7. The board of directors may call for the payment of stock in such sums as they may deem expedient, not exceeding two per cent. at any one time, of which required payment twenty days' notice shall be given in some newspaper printed in Memphis and Little Rock, and a failure to pay, or secure to be paid, according to the rules of the company, any of the installments so called as aforesaid shall induce a forfeiture of the share or shares on which default shall so be made and all payments thereon, and the same shall invest in and belong to the company, and may be restored to the owner or owners by the board of directors, if they deem proper, on the payment of all arrears of such shares, and legal interest thereon; or the directory may waive the forfeiture after thirty days' default, and sue the stockholders for the installments due, at their option.

SEC. 8. The stock of said company may be transferred in such manner as may be directed by the by-laws of said corporation.

SEC. 9. The said company may at any time increase its capital to a sum sufficient to complete the said road, and stock it with anything necessary to give it full operation and effect, either by opening books for new stock or by selling such new stock, or by borrowing money on the credit of the company, and on the mortgage of its charter and works; and the manner in which the same shall be done, in either case, shall be prescribed by the stockholders at a general meeting; and any State or any citizen, corporation, or company of this or any other State or country may subscribe for and hold stock in said company, with all the rights and subject to all the liabilities of any other stockholder.

SEC. 10. The board of directors shall, once in every year at least, make a full report on the state of the company and its affairs to a

general meeting of the stockholders, and oftener, if directed by a by-law, and shall have power to call a general meeting of the stockholders when the board may deem it expedient.

SEC. 11. No person but a citizen of the United States, and being a *bona fide* stockholder in his own right, which he shall have held at least three months previous (except at the first election), shall be president or director of the company, nor shall any stockholder vote in person or by proxy at any general or other election (except the first) who shall not have held in his own right the share or shares on which he offers to vote at least three months previous to such election.

SEC. 12. Stockholders may vote in person or by proxy, and in the election of directors and in voting on all questions which come before a meeting of the stockholders or which may be submitted to the decision of the stockholders in any other manner the owner of one vote for each and every share he, she, or they may own as aforesaid.

5 SEC. 13. The said company may purchase, have and hold, in fee or for a term of years, any lands, tenements, or hereditaments which may be necessary for said road, or appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants, or agents of the company, or for workshops or foundries to be used for the said company, or procuring timber or stores, or other materials necessary for the construction of two roads or its appurtenances, or for effecting transportation thereon.

SEC. 14. The said company shall have the right, when necessary, to construct the said road or any branch thereof, across or along any public road or water course: Provided, Said road, and the navigation of such water course, shall not be thereby obstructed.

SEC. 15. When any lands or right of way may be required by said company, for the purpose of constructing their road, and for want of agreement as to the value thereof, or from other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation, to be made by five commissioners, or majority of them, to be appointed by the circuit court of the county where some part of the lands or right of way is situated; and the said commissioners, before they act, shall severally take an oath before some justice of the peace faithfully and impartially to discharge the duty assigned them. In making the said valuation, the commissioners shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land being taken or the right of way being cumbered, and also the benefit and advantage he, she, or they may receive from the erection or establishment of the said road or works, and shall state particularly the nature and amount of each; and the excess of loss and damage, over and above the benefit and advantage, shall form the amount of valuation of the said land or right of way. The proceedings of said commissioners, accompanied with a full de-

6 scription of said land or right of way, shall be returned under the hands and seals of a majority of the commissioners to the court from which the commission issued, thus to remain of record.

In case either party to the proceedings shall appeal from the valuation to the next session of the court granting the commission, and give reasonable notice to the opposite party of such appeal, and the court shall order a new valuation to be made by a jury, who shall be charged therewith in the same term, or as soon as practicable, and their verdict shall be final and conclusive between the parties, a new trial shall be granted, and the lands or rights of way so valued by the commissioners or jury shall vest in the said company, in fee simple, so soon as the valuation may be paid, or, when refused, may be tendered. Where there may be an appeal, as aforesaid, from the valuation of the commissioners by either of the parties, the same shall not prevent the works intended to be constructed from proceeding; but when the appeal is by the company requiring the surrender, they shall be at liberty to proceed in their works only on condition of giving to the opposite party a bond, with good security, to be approved by the clerk of the court when the valuation is returned, in a penalty equal to double the said valuation, conditioned for the payment of said valuation and interest, in case the same be sustained, and in case it be reversed, for the payment of the valuation thereafter to be made by the jury and confirmed by the court: Provided, That when the land cannot be had by gift or purchase, the operation of the works are not to be hindered or delayed during the pendency of any proceedings to assess its value as aforesaid, nor shall any injunction or supersedeas be awarded by any judge or court to delay the progress of said work.

SEC. 16. In the absence of any contract with the company in relation to the lands through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant, or person in possession thereof, which may be confirmed by the owner, it
7 shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same as being as the same to be used only for the purpose of the road, and no longer, unless the person or persons owning the said land at the time that part of the road which may be on said road (land) was finished, or those claiming under him, her, or them, shall apply for an assessment for the value of said lands, as hereinafter directed, within five years next after that part of said road was finished; and in case the said owner or owners, or those claiming under him, her, or them, shall not apply for such assessment within five years next after the said part was finished, he, she, or they shall be forever barred from recovering the said land, or having any assessment or compensation therefor: Provided, Nothing herein contained shall affect the right of *femes covert* or infants until two years after the removal of their respective disabilities.

SEC. 17. If any person shall intrude upon the said railroad, or any part thereof, by any manner of use thereof, or of the rights and privileges connected therewith, without the permission or contrary to the will of said company, he, she, or they shall forthwith forfeit

to the said company all the vehicles that may be so intruded on said road, and the same may be recovered at law; and the person or persons so intruding may also be indicted for misdemeanor, and, upon conviction, fined and imprisoned by any court of competent jurisdiction.

SEC. 18. If any person shall willfully or maliciously destroy, or in any manner hurt, damage, or obstruct the said railroad, or any bridge, or any vehicle used for or in the transportation thereon, such person or persons so offending shall be liable to be indicted therefor, and, on conviction, shall be imprisoned not more than six nor less than one month, and pay a fine of not less than twenty
8 dollars, and shall be further liable to pay all the expenses of repairing the same; and it shall not be competent for any person so offending against the provisions of this clause to defend himself by pleading or giving the evidence that he was the owner, or agent, or servant of the owner of the land when such destruction, hurt, damage, injury, or obstruction was done or caused at the time the same was caused or done.

SEC. 19. Every obstruction to the safe and free passage of vehicles on the said road shall be deemed a public nuisance, and may be abated as such by an officer, or agent, or servant of the company, and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

SEC. 20. The said company shall have a right to take, at the storehouses they may establish or annex to their road, all goods, wares, merchandise, and produce intended for transportation; prescribe the rules of priority, and charge and receive such just and reasonable compensation for storage as they by rules may establish (which they shall cause to be published), or as may be fixed by agreement with the owner, which may be distinct from the rates of transportation.

SEC. 21. The profits of the company, or so much thereof as the board of directors may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders, in proportion to the stock each may hold.

SEC. 22. Whenever, in the construction of said road, it shall be necessary to cross or intersect any established road or way, it shall be the duty of the company to construct said road across such established road or way so as not to impede the passage or transportation of persons or property along the same; or when it shall be necessary to pass through the land of any individual, it shall be their duty to provide for such individual a proper wagon way or ways across said road from one part of his land to the other.

9 SEC. 23. The said company shall possess such additional powers as may be convenient for the due and successful execution of the powers granted in this charter, and for the successful construction and management of the work.

SEC. 24. This charter shall be amended from time to time, by the Legislature, whenever the president and directors shall unanimously petition for amendments, specifying in the petition the nature of such amendments; and when such amendments shall be adopted

by the Legislature, and submitted to the directory, and be accepted and adopted unanimously by the president and directors, they shall be obligatory upon the stockholders, and not otherwise.

SEC. 25. The president and directors, clerks, agents, officers, and servants of said company shall be exempt from military duty, except in cases of invasion and insurrection; and shall also be exempt from serving on juries and working on public roads.

SEC. 26. The company shall have full power and authority to purchase and own such number of slaves as may be necessary for the construction of said road, and for keeping the same in repair.

SEC. 27. If, by decree or otherwise, the said corporation shall be dissolved, the president and directors of said company are created trustees, with such powers only as may be necessary to collect the debts due the company, and preserve the property and effects of the company to those who may be entitled thereto under the charter.

SEC. 28. The capital stock of said company shall be exempt from taxation until the road pays a dividend of six per cent., and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from and after the completion of said road.

SEC. 29. That said railroad shall commence on the west bank of the Mississippi river, opposite the city of Memphis, running in a westerly direction to the town of Little Rock, on the Arkansas river; to be located in such manner as the board of directors may deem most advisable for the interests of the company

SEC. 30. That said company may use all stone or timber that may be necessary for the construction of the road, free of charge: Provided, The same shall belong to the State; and where such stone or timber belongs to individuals, and shall be necessary for the construction of the road, the company shall have the power to appropriate such material to said purpose; and if the owner or owners of such material shall demand payment for the same, and the owner or owners and the company cannot agree as to the value, three commissioners may be appointed in the same way and with the same powers as are fixed for the valuation of land in the fifteenth section of this act. The right of way through all lands owned by the State is hereby given to said railroad company. In the event that the sum of four hundred thousand dollars shall not be subscribed, as required in the fourth section of this act, then the said subscribers may construct a plank road, beginning at the point designated, opposite the city of Memphis, and extending through the low lands of the Mississippi, to some suitable point on the St. Francis river, in the direction of Little Rock; said plank road to be constructed in a good and sufficient manner; to be graded not less than twenty feet in width, and covered with plank not less than nine feet, the bed or grade not to exceed three degrees; the first gate on said road to be located at or near the Mississippi river, and for every additional five (5) miles, when completed, they shall have the privilege of erecting an additional toll-gate, and shall have the

power to charge and collect the following tolls at each gate: For every wagon, four horses, mules, or oxen, twenty-five cents; for each wagon hauled by three horses, mules, or oxen, twenty cents; for every wagon hauled by two horses, mules, or oxen, fifteen cents; for every one-horse wagon or cart, ten cents; for every pleasure
11 carriage drawn by one horse, ten cents; for each man and horse, five cents; for each horse and mule, five cents; for each head of cattle, two cents; for each head of sheep or hogs, one cent per head. All the powers and privileges granted in the preceding sections of this act to the Memphis and Little Rock Railroad Company, not inconsistent with the object contemplated in granting the privileges to construct this plank road, to be known and styled the "Memphis and Little Rock Plank Road Company," are hereby granted to said plank road company: Provided, That nothing in this act contained shall be so construed as to extend any rights, privileges, or immunities for a longer term than ninety years.

Approved January 11, 1853.

Pamphlet Acts, page 130.

An act to amend the charter of the Memphis and Little Rock Railroad Company.

SECTION 1. Be it enacted by the General Assembly of the State of Arkansas, That the Memphis and Little Rock Railroad Company shall have power and authority to build a branch railroad from some point on their line between White river and Arkansas river by the most direct practicable route to Pine Bluff, in Jefferson county, Arkansas.

SEC. 2. Be it further enacted, That said railroad company shall have the same powers, franchises, and privileges in building and operating said branch road that it has by its charter and amendments thereto upon their main trunk line.

SEC. 3. Be it further enacted, That said railroad company shall have the right to erect all necessary bridges across navigable streams, both upon the main line and said branch road, providing suitable draws thereto for the passage of boats.

SEC. 4. Be it further enacted, That said company shall
12 have the power to regulate the rate and price of freight and the fare of all passengers transported over their main line or said branch.

SEC. 5. Be it further enacted, That all lands which may have heretofore been subscribed, or may hereafter be subscribed, as stock in said road or branch be, and the same are hereby, exempt from taxation for the period of five years from and after the passage of this act, provided the same shall not sooner be sold to other parties.

Approved March 13, 1867.

Pamphlet Acts, page 333.

An act to aid in the construction of the eastern branch of the Cairo and Fulton railroad, and to adopt the Memphis and Little Rock Plank and Railroad survey as said eastern branch.

SECTION 1. Be it enacted by the General Assembly of the State of

Arkansas, That the lands within this State along the length of the Memphis and Little Rock railroad, from Hopefield (opposite the city of Memphis), in the State of Tennessee, to Little Rock, with the right conferred by the act of Congress of selecting other lands in lieu of such lands as may have been sold or otherwise appropriated by the United States, and which lands were granted by an act of Congress to the States of Arkansas and Missouri to aid in constructing a railroad from a point on the Mississippi river, opposite the mouth of the Ohio river, by the way of Little Rock to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river, approved February ninth, eighteen hundred and fifty-three, are hereby granted to the Memphis and Little Rock Railroad Company, so that they may be legally applied in aid of the construction of said branch railroad separately from said main
13 trunk line or the Fort Smith branch thereof, and that the line or route of said road, surveyed by the said Memphis and Little Rock Railroad Company, under and by authority of an act of the General Assembly of this State, entitled "An act to incorporate the Memphis and Little Rock Plank or Railroad Company," approved January eleventh, one thousand eight hundred and fifty-three, which survey has been approved by the board of directory of said company, be, and the same is hereby, adopted and declared to be the line or route for the branch of said Cairo and Fulton railroad to the Mississippi river, except such slight variations as the actual location of the work may, in the judgment of the chief engineer, require, and that a copy of said survey be, immediately after the passage of this act, filed in the office of the secretary of State for preservation: Provided, That citizens or heads of families, being settlers at the passage of this act on the lands herein transferred to the Memphis and Little Rock Railroad Company, shall have a preference right of entry of any legal subdivision, not exceeding one hundred and sixty acres of land, at the price of two dollars and fifty cents per acre, which entry shall be so made as to include the residence of such settler, and the preference right of entry herein granted shall exist from the passage of this law, and for the period of three months after notice shall have been given for three successive weeks in a newspaper published at Little Rock that such lands are in market.

SEC. 2. Be it further enacted, That on or before the first day of January, one thousand eight hundred and fifty-eight, said Memphis and Little Rock Railroad Company shall grade, iron, equip, and fully complete the first division of said railroad, between the Mississippi and St. Francis rivers, being by the line of said survey thirty-seven thirty-three hundredths miles (37.33 miles).

SEC. 3. Be it further enacted, That should said Memphis and Little Rock Railroad Company fail to comply with the require-
14 ments of this section of this act said company shall forfeit to the State of Arkansas all their right, title, and interest in and to said road, or the right to construct the same, together with work and labor done, materials furnished, their right of way, with their charter and all the privileges thereof.

SEC. 4. Be it further enacted, That when twenty consecutive miles of said railroad shall be constructed said Railroad Company shall be authorized to sell one hundred and twenty sections of land on the line of said railroad; and when twenty other consecutive miles of said railroad shall be constructed said company shall or may sell and dispose of one hundred and twenty other sections of land, and so on, as by authority of the act of Congress, until said railroad is completed: Provided, That no part of the land herein transferred to the said Railroad Company, which lies west of White river, or the proceeds of the sale of such land, shall be applied to the construction of any portion of the said road to the east of said White river, or to any other purpose than the construction of the said road to the west of White river, and between that river and the city of Little Rock: Provided, further, That no portion of the land lying on that portion of the line of said road from the Saint Francis to White river shall be taken or applied to the construction of any part of said road lying between Hopefield and the Saint Francis river.

SEC. 5. Be it further enacted, That said Memphis and Little Rock Railroad Company shall grade, iron, equip, and put in complete running order the second division of said railroad, between the Saint Francis and the White rivers, being, as reported by the engineer of said survey, forty-five thirty-eight hundredths miles, on or before the first day of January, one thousand eight hundred and sixty, and upon their failure so to do, shall forfeit, as aforesaid, all work done and materials furnished on said line of road of said second division, and the right to construct and complete the same.

SEC. 6. Be it further enacted, That said Memphis and Little Rock Railroad Company shall, on or before the first day of January, one thousand eight hundred and sixty-three, grade, iron, equip, and fully complete the third division of said railroad, being, from White river to Little Rock, forty-five forty-eight hundredths miles, and upon their failure to complete the same, shall forfeit to the State all the work done and materials furnished, and the road from the Saint Francis river to Little Rock, and everything pertaining thereto, to be disposed of by the State for its completion.

SEC. 7. Be it further enacted, That the said lands shall be selected by said company in conformity with said act of Congress, and when so selected all the title of the State of Arkansas in and to said lands shall be fully vested in said company, for the purpose set forth in said act of Congress, and the said company, through its board of directory, may establish their own rules and regulations for the selection, location, entry, disposition, and conveyance of said lands: Provided, Said rules and regulations do not conflict with the laws of this State or the said act of Congress, and that after eighteen months from the passage of this act it shall be the duty of said railroad company to locate their office at Hopefield, Little Rock, or some other point within this State.

SEC. 8. Be it further enacted, That said railroad company shall be required to conform to the provisions of the said act of Congress in the first section of this act recited, in every particular, and when

said road or any part thereof is completed, it shall be and forever remain a public highway for the United States to convey troops and property of the United States free of costs, and to convey the mail of the United States at such prices as shall be appointed by Congress.

SEC. 9. Be it further enacted, That the Midland Railroad Company, or any other railroad company, shall at all times have
16 the right to form a connection with said Memphis Branch Company, by paying their proportionate amount of the expense of making said connection.

SEC. 10. Be it further enacted, That all the lands hereby granted, belonging to said railroad company, shall be exempt from taxation until said railroad is constructed and in full and complete running order from Hopefield to Little Rock, unless sold by said company to other persons: Provided, That said lands shall not be exempted from taxation for a longer period than eight years from the passage of this act, and that this act take effect and be in force from and after its passage.

Approved January 19, 1855.

An act concerning the Cairo and Fulton railroad and its two branches.

* * * * * * *

SEC. 2. Be it further enacted, That the Memphis and Little Rock Railroad Company having completed the first division of said said road in accordance with the requirements of law, that company is hereby released from all restrictions and conditions in reference to the time of the completion thereof, except such as are imposed by the act of Congress.

* * * * * * *

Approved February 1, 1859.

17 to 24 EXHIBIT B WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Stockholders' Meeting and Proceedings.

HOPEFIELD, ARK., *February* 20, 1860.

Pursuant to public notice the stockholders in the Memphis and Little Rock Railroad Company met at their office in Hopefield, when the following proceedings were had:

* * * * * * *

Mr. Brinkley then offered the following resolution, which was unanimously adopted:

Be it resolved by the stockholders in general meeting assembled, That for the purpose of building and equipping said road, and giving the same full operation and effect, the directors are hereby authorized to increase the capital stock of the company one million three hundred thousand dollars, in the following manner, to wit: By the issuance of bonds of one thousand dollars each, bearing eight per

cent. interest, to which coupons shall be attached, payable semi-annually at any place in the United States which the directors may elect, said bonds to be numbered from one to thirteen hundred, inclusive, signed by the president and countersigned by the secretary, and verified by the seal of the company, not more than thirty years to run from this date, and said directors are authorized to insert in said bonds a contract by which the holder or holders of said bonds may at any time within ten years from the date of said bonds convert the same into ten shares of the capital stock of said company of one hundred dollars each, upon surrender of said bonds and unpaid coupons attached at the office of the company, and to secure the payment of said bonds and coupons the directors are hereby authorized to execute a mortgage upon the road, charter, works, and real estate of the company, or either of them, as they may think best, said mortgage to be signed by the president and verified by the seal of the company.

24 *Directors' Meeting.*

OFFICE M. AND L. R. R. R. CO., *February* 28, 1860.

The directors met pursuant to adjournment, John Robertson, president; D. H. Townsend, R. C. Brinkley, and H. B. Edmondson being present, and proceeded to business.

R. C. Brinkley then offered the following resolution, which, on motion, was unanimously adopted:

Resolved by the board of directors of the Memphis and Little Rock Railroad Company, That in accordance with authority given by the stockholders in this company, that the president of this board be, and he is hereby, authorized to issue thirteen hundred bonds of one thousand dollars each, having thirty years to run from their date, and that they be dated May 1, 1860, with interest at the rate of eight per cent. per annum, payable semi-annually in the city of New York, and that the Memphis and Little Rock railroad, its franchises, and works, and all lands and real estate, be mortgaged to secure the payment of said thirteen hundred bonds and interest.

The president of the road then presented the form of first mortgage bond as follows:

UNITED STATES OF AMERICA:

No. 1—First Mortgage, Eight Per Cent. Bond of the Memphis and Little Rock Railroad Company.

This certifies that the Memphis and Little Rock Railroad Company is indebted to the bearer the sum of one thousand dollars, lawful money of the United States, for value received, in consideration whereof the said Memphis and Little Rock Railroad Company do hereby promise and agree to pay to the bearer hereof the
25 said sum of one thousand dollars, in the city of New York, on the first day of May, A. D. one thousand eight hundred and ninety. And the said Memphis and Little Rock Railroad Company do hereby promise and agree to pay interest thereon at the

rate of eight per cent. per annum, semi-annually on the first day of May and November, in each and every year ensuing the date hereof, until the said principal sum shall be paid, upon the presentation and delivery of the coupons hereto annexed, in the city of New York. This bond is one of thirteen hundred of like tenor and date issued by authority of the stockholders of the said Memphis and Little Rock Railroad Company, and in accordance with its charter; and the holder is entitled to the security to be derived from a deed of trust, be-ing even date herewith, on the said railroad, its rights, and franchises of every description on the real and personal estate of said company, as will more fully appear in said deed of trust, executed and delivered to Sam. Tate and R. C. Brinkley, of Memphis, and George C. Watkins, of Little Rock, to secure the full payment of principal and interest of said bond.

The holder hereof is entitled at any time until the first day of May, 1870, to require and receive ten shares of one hundred dollars each of the capital stock of said company, in discharge of this bond and the unpaid coupons attached, upon presentation and surrender of them at the office of said company in Memphis. This bond is transferable by delivery merely, and the said Memphis and Little Rock Railroad Company hereby waives all benefit from valuation and appraisement laws.

In testimony whereof the said company have hereunto caused to be affixed their corporate seal, and these presents to be [SEAL.] subscribed by their president and countersigned by their treasurer on the first day of May, 1860.

First Mortgage.

26 This indenture, made and entered into this first day of May, in the year of our Lord one thousand eight hundred and sixty, between the Memphis and Little Rock Railroad Company, a corporation duly chartered, organized, and doing business within the State and under the laws of Arkansas, of the first part, and Sam. Tate and Robert C. Brinkley, of the city of Memphis, in the State of Tennessee, and George C. Watkins, of the city of Little Rock, in the State of Arkansas, of the second part, witnesseth: That for and in consideration of the sum of five dollars cash, paid by the party of the second part, the receipt of which is hereby acknowledged, and the other considerations hereinafter appearing, the said Memphis and Little Rock Railroad Company have this day bargained and sold, and do hereby convey to the said Sam. Tate, Robert C. Brinkley, and George C. Watkins, the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite the city of Memphis aforesaid, to the city of Little Rock, in the State of Arkansas, its road-bed, right of way, and all works and rolling-stock of or belonging to said company, together with the charter by which said company was incorporated and under which it is organized, and all the rights and privileges and franchises thereof, and also all the lands lying in the State of Arkansas, granted to said party of the first part by the State of Arkansas by the act of the Legislature of

said State approved January 19, 1855, and by the act of the Congress of the United States approved the ninth day of February, 1853, which said Memphis and Little Rock Railroad Company now own, as more particularly set forth and described in "Exhibit A," an appendix to this indenture containing a list of said lands, and to which reference is here made to identify the same, to have and to hold to said Sam. Tate, Robert C. Brinkley, and George C. Watkins, their successors and assigns forever; and the said party of the first part doth covenant to and with the parties of the second part that they
27 are lawfully seized and possessed of said lands, road-bed, and right of way, have a good right to convey the same, and that they will forever warrant and defend the title thereof to the said parties of the second part, their successors and assigns forever. But this deed is made for the following purposes and upon the following trusts, and no other purpose—that is to say:

Whereas the said Memphis and Little Rock Railroad Company, in order to raise money for the purpose of building and equipping their road and giving the same full operation and effect, have resolved in a general meeting of the stockholders to issue the bonds of the company to an amount not exceeding one million three hundred thousand dollars, to wit: Said bonds are to be for the sum of one thousand dollars each, payable on the first day of May, in the year 1890, to bearer, with interest at the rate of eight per cent. per annum, payable semi-annually, on the first days of May and November of each and every year thereafter till the maturity of said bonds, for which coupons shall be attached; said bonds bearing even date with this indenture, and being convertible on their face into the stock of the company, and further identified as the bonds herein secured by a certificate thereon to that effect, signed either by said Sam. Tate, Robert C. Brinkley, or George C. Watkins; and the Memphis and Little Rock Railroad Company being desirous to secure to the holders of said bonds who may purchase the same, or advance money thereon, or hold the same for any lawful purpose, the prompt and certain payment of the interest on said bonds as it may fall due, according to the coupons thereto attached, and also the prompt and certain payment of the principal of said bonds when the same shall become due and payable—now, to effect these objects this indenture is made, and the following stipulations and agreements are entered into:

First. It is expressly understood and agreed that, if the said Memphis and Little Rock Railroad Company shall promptly pay
28 the interest on said bonds at the time and places agreed upon in the coupons aforesaid, and the principal of the bonds when they become due and payable, then this obligation is to become null and void, and the title herein conveyed is to revert and revest in the party of the first part without any reconveyance whatsoever.

Second. The Memphis and Little Rock Railroad Company reserve the right and privilege, up to the time of their making default in payment of either the interest or principal of said bonds, or some part thereof, to retain the possession and control of the property herein conveyed, and to sell and convey such portion of the lands herein conveyed as to them may seem proper and advantageous to

the interest of the company; but the proceeds of any sale or sales thereof shall be deemed and held sacredly as a trust fund in the hands of said company, and shall be applied in good faith to the building, completing, and equipping of said road, and giving it full operation and effect, or to retiring said bonds, as the company may think best.

Third. It is also further understood and agreed that, should said Memphis and Little Rock Railroad Company fail to pay the interest on said bonds promptly as the same becomes due and payable, the said Sam. Tate, Robert C. Brinkley, and George C. Watkins shall and may immediately take possession of the lands mentioned in "Exhibit A," and advertise the same, or so much thereof as may be necessary, for one month, in two of the daily papers published in Memphis, Tennessee, and one paper published in the city of Little Rock, in Arkansas; and after such notice shall, at the time and place designated therein, proceed to sell so much of said lands lying along or adjacent to any completed section of said road to the highest bidder for cash; and after paying expenses of said sale, immediately pay and discharge such interest as may be due, and any surplus funds arising from such sale shall be expended in completing and equipping said railroad, and furnishing it everything necessary to give it full operation and effect.

29 And it is also further understood and agreed that, in the event the lands along the completed sections of said road should fail to produce by their sale a sum sufficient to pay such interest on said bonds as may be due, then, and in that event, said Sam. Tate, Robert C. Brinkley, and George C. Watkins shall in like manner, and under the same rules, regulations, and restrictions, proceed to sell the other lands herein conveyed, which may be along the portion of the road not completed, and the proceeds likewise apply. And it is further understood and agreed that, if the party of the first part shall pay the interest, but shall fail to meet the principal of said bonds, then, and in that event, the said Sam. Tate, Robert C. Brinkley, and George C. Watkins are, in like manner, and under the same rules, regulations, and restrictions, to sell said lands for the purpose of paying the principal of said bonds, and apply the proceeds to said purpose; any surplus in their hands to be applied in building, completing, or equipping said road, as the same may be necessary at the time.

Fourth. It is also further understood and agreed that, in the event the proceeds *to* the sale of the lands heretofore provided for shall fail to meet the interest or principal of said bonds, as the case may be, then, as a further security to the holders of said bonds, the said Sam. Tate, Robert C. Brinkley, and George C. Watkins shall, upon the written request of a majority in number and value of those owning said bonds, by virtue of this authority, take possession of said railroad in its entire length, of its depots, road-bed, right of way, franchises, rights, and privileges, rolling-stock, and everything of or pertaining to said road, and shall run or operate said road for the term of five years from the date of said possession, and the net earnings of said road made during said time apply from time to

time to the completion of said road. If the same should be incomplete, and the surplus money over and above such amounts of the net earnings as may be thus expended, they shall apply from time to time to the payment of the interest or the principal
30 of said bonds, as the same may become due, or to both, if both principal and interest be due and unpaid; and if at the end of said term of five years the net earnings of said road shall not have discharged the principal and interest of said bonds, then, and in that event, upon the written request of a majority in number and value of the holders of the unpaid bonds, the said parties shall advertise said road, rights of way, road-bed, warehouses, depots, and depot grounds, rolling-stock, its charter, rights, privileges, and franchises, and all property owned by said railroad company, for sale, for two months, in at least one newspaper of most general circulation in the city of Little Rock, one or more newspapers published in the city of Memphis, and such other cities as to the said Sam. Tate, Robert C. Brinkley, and George C. Watkins may seem proper; said sale to be at Memphis, in the State of Tennessee; and, in pursuance of said notice, shall sell the same to the highest bidder, for cash, and apply the proceeds, after deducting all expenses and reasonable charges, to the extinguishment of the bonds and interest thereon, aforesaid. And the said parties of the second part shall, in the event of any sale by them, either of land or otherwise, under the power herein conferred, make to the purchaser or purchasers all necessary deeds of conveyance, and the same shall forever bar and estop the Memphis and Little Rock Railroad Company.

Fifth. It is also further understood and agreed that, in the event of the death, mental incapacity, removal or resignation of either of the parties of the second part, the one or two remaining, as the case may be, shall have and exercise all the rights, powers, and duties hereinbefore conferred upon the three. And in the event of the death, removal, mental incapacity or resignation of all three of the persons aforesaid, then a majority in number and value of said bondholders may apply to any court in the State of Arkansas, having jurisdiction thereof, and have one or more trustees appointed in the room and stead of said parties of the second part; and
31 such person or persons substituted shall and may have and exercise all the powers, privileges, and duties herein conferred upon the trustees aforesaid; and all his or their acts in the premises shall be in like manner binding upon the party of the first part. And said Memphis and Little Rock Railroad Company do hereby waive all benefit from stay or appraisement laws, and do declare that any sale made in pursuance hereof shall confer upon the purchaser or purchasers a fee simple title, absolute, free from all equity and redemption.

In witness whereof, the parties of the first part have caused their corporate seal to be hereunto affixed, and the same to be subscribed by their president; and the said parties of the second part have set their hands and seals, the day and year first above written.

JOHN ROBERTSON,
President.

Signed, sealed, and delivered in presence of—
[SEAL.] ——— ———
——— ———

Trustees.

31*a* EXHIBIT B 7 WITH ANSWER.

R. K. Dow *et als.*, Trustees, *vs.* M. & L. R. R. Co.

This indenture, made this the tenth day of January, one thousand eight hundred and sixty-one, between the Memphis and Little Rock Railroad Company, a corporation chartered by the General Assembly of the State of Arkansas, of the first part, and the State of Arkansas, of the second part, witnesseth:

Whereas the General Assembly of the State of Arkansas, by an act entitled "An act to encourage internal improvements," approved January third, one thousand eight hundred and sixty-one, appropriated the sum of one hundred thousand dollars out of the five per cent. fund, to be loaned to said Memphis and Little Rock Railroad Company for ten years at eight per cent. interest, payable annually, secured by a mortgage on said road, and the rolling-stock belonging to said road:

31*b* Now, this indenture witnesseth, that the said Memphis and Little Rock Railroad Company, in order to comply with the requirements of said act, and to secure payment of said sum of one hundred thousand dollars at the expiration of ten years from the date hereof, together with eight per cent. interest thereon, payable annually, do by these presents bargain, sell, and convey to the State of Arkansas the Memphis and Little Rock railroad, and the rolling-stock belonging to said road, subject to the condition that if the said company, at the end of ten years from this date, shall pay to the State the said sum of one hundred thousand dollars and interest annually, at the rate of eight per cent. per annum, then the above conveyance shall be void, and the property mortgaged revest in said company without any conveyance to that effect.

31*c* In testimony whereof, the parties of the first part have caused this mortgage to be executed in their behalf by the same being signed by their president and sealed with the corporate seal of said company.

MEMPHIS AND LITTLE ROCK
RAILROAD COMPANY, [SEAL.]
By JOHN R. ROBERTSON,
President Memphis and Little Rock Railroad Company.

S. H. HEMPSTEAD, *Witness.*

31*d* STATE OF ARKANSAS, *County of Pulaski:*

Be it remembered that on this tenth day of January, A. D. 1861, before me, Herald C. Low, an acting and duly commissioned justice of the peace within and for the county aforesaid, personally came the above-named John Robertson, president of the Memphis and Little Rock Railroad Company, and acknowledged that such com-

pany by him, as its president, had made and executed the foregoing mortgage to the State of Arkansas for the uses and purposes and considerations therein expressed and set forth, and I do so certify.

H. C. LOW, *J. P.*

32 EXHIBIT C WITH ANSWER.

R. K. DOW *et als.*, Trustees, *v.* M. & L. R. R. Co.

Extract from Proceedings of Stockholders' Meeting, February 15, 1871.

On motion of R. C. Brinkley, Esq., the following resolution was adopted—all the stock represented in this meeting voting in favor of it:

"Resolved by the stockholders, in convention assembled, That the board of directors (a quorum being present) be authorized, and they are hereby directed, to prepare and issue one thousand second-mortgage bonds of thousand dollars, having not more than thirty years to run, with coupons attached, payable semi-annually, with interest at the rate of seven per cent. per annum—principal and interest payable at such time and place in New York as the board of directors may designate; and the board of directors are authorized to pledge and mortgage all the lands, franchises, rolling-stock, iron rails, cross-ties, road-bed, and depots and depot buildings, as well as every other species of property owned by this company, or which they may hereafter acquire by purchase or otherwise; and also to pledge the net receipts of said road for the payment of the principal and interest of said second-mortgage bonds.

"The board of directors are fully authorized to fix the terms and the manner and form of the bond, as well as the mortgage hereby authorized to be executed."

Second Mortgage.

This deed, this day made by and between the Memphis and Little Rock Railroad Company, a corporation existing in and by the laws of the State of Arkansas, and Henry F. Vail, of the city and State of New York—

33 Witnesseth: That the Memphis and Little Rock Railroad Company, for the consideration hereinafter appearing, has this day granted, bargained, and sold, and by these presents doth convey to the said Henry F. Vail, all the lands, franchises, rolling-stock, iron rails, cross-ties, road-bed, right of way, and depots and depot buildings, as well as every other species of property owned by this company, or which it may hereafter acquire by purchase or otherwise, pertaining to the main line of said road from Little Rock, and also to pledge the net receipts of said road.

To have and to hold the said granted property to the said Henry F. Vail and his heirs and successors forever.

And the Memphis and Little Rock Railroad Company hereby covenants with the said Henry F. Vail, that it is lawfully seized and possessed of all the said granted property, has a good right hereby to convey the same, and that it will forever warrant and defend the title against all lawful claims.

But a part of the property hereby conveyed is subject to a former deed of mortgage made on the first day of May, 1860, by the Memphis and Little Rock Railroad Company to Sam. Tate, Robert C. Brinkley, and George C. Watkins, which is of record in the office of the recorder of the county of Pulaski, in the State of Arkansas, to which reference is now here made.

For the purpose of raising the money necessary to complete its railroad, and equip the same, and put it in full operation, and pay past due coupons on first mortgage bonds, and all outstanding past due liabilities, the stockholders of the Memphis and Little Rock Railroad Company have, at a general meeting held at Hopefield, Arkansas, February 15, 1871, authorized the issue of the bonds of the company, to be designated second mortgage bonds, to the amount of one million dollars, each bond to be for the sum of one thousand dollars, dated on the first day of March, 1871, and payable on the first day of January, 1901, to the bearer, with interest at the
34 rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, till the maturity of the bonds, for which coupons are to be attached to each bond, payable at the Bank of Commere, in the city of New York, and each bond having a certificate of identity indorsed upon it, and signed by the said Henry F. Vail.

Now, for the purpose of securing the prompt payment of the said coupons for interest as they mature, and for the further purpose of securing the faithful payment of said bonds when they fall due, and for no other purpose, this deed is made. And it is expressly agreed if the said coupons shall be paid as they fall due, according to the tenor of the same, and if the said bonds shall be paid when they become payable, then this deed is to become inoperative and of no effect, and the property hereby conveyed is to revest in the Memphis and Little Rock Railroad Company, who is to retain and hold undisturbed possession, and have the use of the same until default is made.

And the Memphis and Little Rock Railroad Company also retains the power to sell, convey, and dispose of all or such portions of the lands described in the schedules hereto annexed as to it may seem proper and advantageous to the interest of the company, and pledges itself to apply the proceeds of the lands that may be sold and disposed of in good faith only for the purpose of paying such of its existing indebtedness as is a lien or charge upon the property hereby conveyed, or for the purpose of paying the coupons or bonds that are intended to be hereby secured.

If the coupons attached to the said bonds, or any part of them, are not paid at maturity, then the said Henry F. Vail may, after the coupons shall have been due sixty days, upon a request in writing of a majority in number and value of those holding the coupons that are due and unpaid, take possession of and sell a sufficiency of the property hereby conveyed him to pay what remains unpaid of the said coupons, after advertising the same in the
35 same manner as other sales of similar property are required by law or by custom to be advertised, and such sale shall

be made either at the city of Little Rock or at the eastern terminus of said railroad, as the said Henry F. Vail may elect, and shall be to the highest bidder for cash; and in case of such sale, the said Henry F. Vail shall have the right to designate the property that shall be sold for the said purpose; or if the majority in number and value of the holders of the coupons that may remain due and unpaid shall elect to do so, they may postpone the sale of the property hereby conveyed for the payment of the said coupons that are so due and unpaid for the period of twelve months, and at the expiration of the said period the said Henry F. Vail shall, upon the request in writing of a majority in number and value of the holders of the bonds and coupons hereby secured, offer for sale and sell all the property hereby conveyed him in the manner, upon the terms, and at the time and place hereinbefore presented for the sale of the property hereby conveyed for the payment of past due coupons. After making the sale, the said Henry F. Vail shall make proper conveyances of the property sold. If the sale has been made for the payment of coupons only, after paying the necessary expense he shall appropriate the proceeds of the sale to the payment of such coupons for interest as may remain due and unpaid, and surrender such coupons as he may pay to the Memphis and Little Rock Railroad Company. And if the sale is made of all the property hereby conveyed after the coupons shall have been unpaid and due for twelve months as is above provided for, then the proceeds of the sale, after paying the necessary expenses, shall be applied *pro rata* to the payment of the coupons that are due, and the principal of the outstanding bonds, and after the payment of all such expenses, coupons, and bonds the balance shall be paid to the Memphis and Little Rock Railroad Company. And if the principal of the said bonds, or any of them, shall, after maturity, remain unpaid, then the said Henry F. Vail
36 is, in the same manner and under the same terms and restrictions, to sell the property hereby conveyed, or a sufficiency thereof to pay the bonds that may remain so unpaid, and he shall apply the proceeds of such sale to the payment of the said bonds, and the bonds he pays he shall turn over to the Memphis and Little Rock Railroad Company.

But no sale shall be made of the road-bed, right of way, warehouses, depots, depot grounds, rolling-stock, charter, rights, privileges or franchises of the company, nor of any property absolutely necessary to the running or operating of the railroad, unless a majority in number and value of those holding coupons or bonds, as the case may be, which are to be paid out of the proceeds of such sale, shall request the said Henry F. Vail, in writing, to make such sale.

In the event of the substitution of any other party as trustee in this deed, in the place of the said Henry F. Vail, he shall have all the powers and rights and duties hereby given or conferred upon the said Henry F. Vail, and a trustee may be so substituted in any mode provided by law.

And the Memphis and Little Rock Railroad Company hereby waives the right or equity of redemption in or to any property which

may be sold under the provisions of this deed, and also waives the benefit of any and all appraisement, valuation or stay laws, and agrees that the title of the purchaser shall be absolute upon the completion of the sale, and the payment of the purchase-money.

Witness the signature of the president of the Memphis and Little Rock Railroad Company, and the seal of the company, this the first day of March, 1871.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY,
By SAM. TATE, *President.*

[SEAL.] Attest: JOHN W. GOODWIN,
Secretary and Treasurer.

37 EXHIBIT D WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Deed of Henry F. Vail, Trustee, to Stillman Witt.

This indenture, made and executed this seventeenth day of March, A. D. one thousand eight hundred and seventy-three, at Hopefield, county of Crittenden, State of Arkansas, by and between Henry F. Vail, of the city of New York, State of New York, as trustee of the second mortgage, and executed by the Memphis and Little Rock Railroad Company, a corporation existing in and by the laws of the State of Arkansas, and executed on the first day of March, 1871, of the first part, and Stillman Witt, in trust, of the State of Ohio, of the second part, witnesseth:

That the day and date last aforesaid a certain deed of mortgage was executed by said railroad as party of the first part unto the said Henry F. Vail, as trustee, of the second part, wherein and whereby, after reciting that the said Railroad Company, for the purpose of raising the money necessary to complete its railroad and equip the same and put it in full operation, and pay past-due coupons on the company's first mortgage bonds, and all past outstanding liabilities of said company, had been authorized by the stockholders of said company at a general meeting held at Hopefield, State of Arkansas, on the fifteenth day of February, 1871, to issue the bonds of said company to be designated second mortgage bonds, to the amount of one million dollars, each bond for the sum of one thousand dollars, dated on the first day of March, 1871, and payable on the first day of January, 1901, to the bearer, with interest at the rate of seven per

38 cent. per annum, payable semi-annually on the first days of January and July in each year, until the maturity of the bonds for which coupons were to be attached to said bonds, and for the purpose of securing the prompt payment of the said coupons for interest as they matured, and for the further purpose of securing the faithful payment of said bonds when they should fall due, and for no other purpose, the said Railroad Company granted, bargained, and sold, and by said presents did convey to said Henry F. Vail all the lands, franchises, rolling stock, iron rails, cross-ties, road-bed, right of way, and depots and depot buildings, as well as every other species of property owned by said company, or which it might there-

after acquire by purchase or otherwise, pertaining to the main line of said road from Memphis to Little Rock, and also pledged the net receipts of the road aforesaid, and the said Railroad Company then and there covenanted with the said Henry F. Vail that it was lawfully seized and possessed of all said granted property, and that it had a good right thereby to convey the same, and that it would warrant forever and defend the title against all lawful claims; but it was then and thereby further conditioned that a part of the property thereby conveyed was subject to a former deed of mortgage made on the first day of May, 1860, by the said Memphis and Little Rock Railroad Company to Sam. Tate, Robert C. Brinkley, and George C. Watkins, which was of record in the office of the recorder of the county of Pulaski, and State of Arkansas, to which reference was then and there made, and the said railroad retaining the power to sell, convey, and dispose of the lands in the schedule attached to said mortgage described, the proceeds of said sale to be appropriated to the payment of such of its existing indebtedness as was a lien or charge upon the property thereby conveyed, or for the purpose of paying the coupons or bonds that were intended to be thereby secured; and whereas, it was further covenanted and agreed by and between the said Railroad Company and said Henry F. Vail, as such trustee, in and by said deed of
39 second mortgage, and was thereby further conditioned that if the coupons attached to said bonds, or any part of them, was not paid at maturity, then the said Henry F. Vail might, after the coupons shall have been due sixty days, upon the request in writing of a majority in number and value of those holding the coupons that are due and unpaid, take possession of and sell a sufficiency of the property thereby conveyed to him to pay what remained unpaid of the said coupons, after advertising the same in the manner as other sales of similar property are required by law or by custom to be advertised, and such sale was to be made either at the city of Little Rock or at the eastern terminus of said railroad, that the said Henry F. Vail might elect, and should be the highest bidder for cash; and in case of such sale the said Henry F. Vail should have the right to designate the property that should be sold for the said purpose; or if the majority in number and value of the holders of the coupons that might remain due and unpaid should elect to do so, they might postpone the sale of the property thereby conveyed for the payment of the said coupons that are so due and unpaid for the period of twelve months, and at the expiration of said period the said Henry F. Vail should, upon the request in writing of a majority in number and value of the holders of the bonds and coupons thereby secured, and offer for sale and sell all the property thereby conveyed to him in the manner, upon the terms, and the time and place thereinbefore prescribed for the sale of the property thereby conveyed for the payment of said past-due coupons, and after making said sale said Henry F. Vail should make proper conveyances of the property sold; and if the sale should be made for the payment of coupons only, after paying the necessary expenses, he should appropriate the proceeds of the sale

to the payment of such coupons for interest as might remain due and unpaid, and surrender such as he might pay to the Memphis and Little Rock Railroad Company, and if the sale should be made of all the property thereby conveyed, after the coupons shall
10 have been due and unpaid for twelve months, as thereinbefore provided, then the proceeds of the sale, after the paying of the necessary expenses, should be applied *pro rata* to the payment of the coupons that should then be due, and the principal of the outstanding bonds, and after the payment of all such expenses, coupons, and bonds the balance should be paid to said company; the said Memphis and Little Rock Railroad Company, in and by said deed of second mortgage, waived the right of equity of redemption in or to any property which might be sold under the provisions of said deed, and also waiving the benefit of any and all appraisement, valuation, or stay laws, and then and there and thereby agreeing that the title of the purchaser should be absolute upon the completion of the sale and the payment of the purchase-money, and said deed was duly executed, acknowledged, and afterwards recorded properly; and whereas the holders of a majority in number and value of the bonds issued by said Memphis and Little Rock Railroad Company under said mortgage deed of date of the first day of March, 1871, as aforesaid, did notify in writing the said Henry F. Vail, trustee in said deed and party of the first part hereto, that said company failed or refused to pay the coupons on said bonds held by them that matured on the first day of January and on the first day of July, 1872, respectively, according to the terms and conditions of said coupons, and that they, holders of such coupons, elected to postpone the collection of said coupons, and a sale of the property conveyed by said mortgage for their payment of the said coupons that matured on the first day of January, 1872, for twelve months thereafter, as provided in said mortgage, and said term of twelve months had elapsed and expired, and no provision had been made by said Memphis and Little Rock Railroad Company for the payment of said coupons, and they, the said holders of a majority in number and value of said bonds on account of such failure to pay said coupons, did thereupon request and direct in writing the said Henry F. Vail, as such trustee, to make
11 sale of all the property of all kinds, real, personal, and mixed, including lands, road-bed, right of way, warehouses, depots, depot grounds, rolling stock, charter, rights, privileges, or franchises, and charter of said Memphis and Little Rock Railroad Company, and so conveyed to said Henry F. Vail, as trustee, in and by said deed of second mortgage, in order to pay, first, the expenses of said sale, and second, to the payment *pro rata* of the unpaid coupons due on said bonds and the bonds of said company as aforesaid, and to secure the payment whereof said mortgage deed was executed; and whereas the said Henry F. Vail, party of the first part hereto, as such trustee, did, after receiving said written notice, cause to be prepared a printed notice that he would, in pursuance of the written request and direction of the holders of a majority in number and value of the bonds issued by the said Memphis and Little Rock Railroad

Company under said deed of mortgage of date of the first day of March, 1871, on account of the failure to pay the interest coupons due and that matured on said bonds on the first day of January, 1872, and first day of July, 1872, as aforesaid, offer for sale, and would sell, to the highest bidder, on Monday, the seventeenth day of March, eighteen hundred and seventy-three, between the hours of ten o'clock a. m. and three o'clock p. m. of said day, for cash in hand, at the eastern terminus of the Memphis and Little Rock Railroad Company, all the lands, franchises, and rolling stock, iron, rails, cross-ties, road-bed, right of way, depots and depot buildings, charter, rights, and privileges, and every other species of property belonging to said company, or so much thereof as might be sufficient to pay, first, the expense of said said sale, and second, the payment *pro rata* of the unpaid coupons due on said bonds secured by said mortgage; but said sale of said property would be made subject to the lien on the whole, or any part thereof, that might exist in favor of the holders of the bonds known as the first mortgage bonds of said company, amounting to one million three hundred thousand dollars, and the
42 coupons thereon that have not been paid and are secured by the mortgage executed on the first day of May, 1860, by the said Memphis and Little Rock Railroad Company, of the first part, to Sam. Tate, Robert C. Brinkley, and George C. Watkins, as trustees, of the second part, and which mortgage was duly recorded, and, furthermore, subject to all liens of the State of Arkansas upon said property, or any part thereof, previously to the lien arising under said second mortgage deed of said company under which this sale is made, and also subject to all liens whatever that are superior to the lien created by said mortgage, and that said railroad company had on their part covenanted on their behalf that, upon sale being had, the said company thereby waived the right of equity of redemption in or to any of the property which might be sold under said deed of mortgage; also, the benefit of any and all appraisement, valuation, or stay laws, and that the title of the purchaser should be complete at said sale, so far as the company was concerned; and whereas said Henry F. Vail, as such trustee, did cause said printed notice of the time and place, terms and conditions of said sale, to be posted at six of the most public places in each of the counties of Pulaski, Prairie, Monroe, St. Francis, and Crittenden, of the State of Arkansas, one of the said notices being posted on the court-house door of said several counties, and at the eastern terminus of said railroad, more than thirty days previous to said day of sale, and did furthermore cause to be published before said sale at least two insertions in the weekly newspapers styled the Little Rock Republican and Arkansas Gazette, published in the county of Pulaski aforesaid, and in the weekly newspaper published in the county of Prairie aforesaid, called the White River Journal, and in the weekly newspaper called the Forrest City Times, published in the county of St. Francis aforesaid, said counties being the counties through which the line of said railroad is located, and its property, real and personal, is mostly situated and being, and said newspapers being the ones pub-
43 lished in said counties; and whereas the said Henry F. Vail,

as such trustee, did, on the day fixed for sale of said above-described premises, attend in person at the place fixed for sale, at the terminus of said Memphis and Little Rock Railroad Company, in the county of Crittenden, State of Arkansas, and did then and there, between the hours of 10 o'clock a. m. and 3 o'clock p. m. of said day, the seventeenth of March, 1873, offer for sale, and did sell, to the highest bidder, for the sum of fifteen thousand dollars in cash, all the lands, franchises, and rolling stock, cross-ties, road-bed, right of way, and depots and depot buildings, charter, rights, privileges, *rights*, credits, and effects, and every species of property belonging to the Memphis and Little Rock Railroad Company, as far as the same had been conveyed to him by said second mortgage deed, and he had power to sell the same thereunder, and with all rights of equity of redemption in and to any and every part thereof, waived on the part of said company, as well as the benefit of any and all appraisement, valuation, and stay laws, and by absolute title to the purchaser, so far as said company was concerned, subject, however, to the lien on the whole, or any part thereof, that might exist in favor of the holders of the bonds known as the first mortgage bonds of said company, amounting to one million three hundred thousand dollars, and the coupons thereon that have not been paid, and which mortgage was executed on the first day of May, 1860, to secure the payment of said bonds and coupons by the said Memphis and Little Rock Railroad Company of the first part, and Sam. Tate, Robert C. Brinkley, and George C. Watkins of the second part, and which mortgage was duly recorded, and furthermore subject to all liens of the State of Arkansas upon said property, or any part thereof, arising previously to the lien of said second mortgage deed, and also subject to all other liens whatever that are superier to the lien created by said mortgage deed, and for the discharge and payment whereof,
44 and every part of the same, said property so sold was to be held by the purchaser hereof liable and subject, and when and where the said Stillman Witt, party of the second part hereto, being the lost and highest bidder, became the purchaser thereof for the sum of fifteen thousand dollars, and subject to all the liens aforesaid that existed prior to the execution of said second mortgage deed, and then and there at said sale, and previous to its taking place, estimated and announced by said trustee publicly as amounting to about three millions one hundred and eighty thousand dollars probably;

Now, therefore, the indenture witnesseth, that the party of the first part hereto, for and in consideration of the premises and the sum of fifteen thousand dollars, so bid as aforesaid, to him in hand paid by the said party of the second part, and the express understanding and agreement that said property is held by the purchaser subject to the full discharge and payment of the above-described and all other liens upon said property that existed before the execution of said second mortgage, has bargained, sold, aliened, remised, released, confirmed, and conveyed, and by these presents does bargain, sell, alien, remise, release, confirm, and convey, subject to the lien on the whole or any part thereof that may exist in favor of the

holders of the bonds known as the first mortgage bonds of said company, amounting to one million three hundred thousand dollars, and the coupons thereon that have been paid, and the payment whereof was secured by deed of mortgage, duly executed on the first day of May, 1860, by said Memphis and Little Rock Railroad Company, of the first part, and Sam. Tate, Robert C. Brinkley, and George C. Watkins, of the second part, as trustees, and which was duly recorded, and furthermore subject all liens of the State of Arkansas upon the property as hereinbefore and hereafter described and conveyed arising previously to the execution of said second mortgage deed of said company under which this sale is made, and also subject to all other liens whatsoever that are
45 superior to the lien created by said mortgage deed, called the second mortgage deed, unto the said party of the second part, Stillman Witt, in trust forever, all the lands, franchises, and rolling-stock, iron rails, cross-ties, road-bed, right of way, and depot buildings, and depots, charter, rights, and privileges, and all the rights, credits, and effects, and every other species of property of any nature and kind whatever, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any way appertaining, as the same are described and conveyed in and by the said indenture of mortgage, and also all the estate, right, title of interest, property, claim, and demand whatsoever, both in law and equity, of the said Memphis and Little Rock Railroad Company, as well as of said party of the first part, as trustee as aforesaid, as fully to all intents and purposes as the said party of the first part has power and authority to sell and grant the same by virtue of the second mortgage deed, to have and to hold the said above granted and conveyed premises, subject to the several liens above specifically described or generally alluded to, but free from all right or equity of redemption, etc., on the part of said Memphis and Little Rock Railroad Company, with their appurtenances and every part thereof, unto the said Stillman Witt, in trust, party of the second part hereto, forever.

In witness whereof, I, Henry F. Vail, party of the first part, as trustee as aforesaid, have hereunto set my hand and private seal, at Hopefield, county of Crittenden, State of Arkansas, on this the seventeenth day of March, A. D. eighteen hundred and seventy-three.

[SEAL.] HENRY F. VAIL, *Trustee.*

Signed, sealed, and delivered in our presence—
GEORGE A. GALLAGHER.
JOHN W. D. GARGINLO.

46 EXHIBIT E WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Deed of Stillman Witt.

This indenture, contract, declaration, and agreement, made and entered into on this the twenty-ninth day of March, 1873, by and

between Stillman Witt, of the first part, and J. H. Wade, John J. Astor, Robert Lenox Kennedy, A. A. Law, George T. Adee, William B. Greenlaw, Hu. L. Brinkley, and Sam. Tate, of the second part, and by and between all of the parties hereto, each with the other—

Witnesseth, That the Memphis and Little Rock Railroad Company, a body politic and corporate, created by and organized under and by virtue of a charter granted by the Legislature of the State of Arkansas, entitled an act to incorporate the Memphis and Little Rock Plank or Railroad Company, approved January 11, 1853, did by virtue of and pursuant to the power given by the ninth section of said charter or act, on the first day of March, 1871, make, execute, and deliver to Henry F. Vail, of the State and city of New York, a deed of trust or second mortgage, by which the said Memphis and Little Rock Railroad Company conveyed to said Henry F. Vail all the lands, franchises, rolling-stock, iron rails, cross-ties, roadbed, right of way, and depots, and depot buildings, as well as every other species of property then owned by the company, or which it might thereafter acquire by purchase or otherwise pertaining to the main line of said road from Memphis to Little Rock, and also pledged the net receipts of said road. This mortgage was made for the purpose of securing the prompt payment of all coupons for interest as they matured, and for the further purpose of securing the
47 payment of one million dollars of second mortgage bonds, authorized to be issued at a general meeting of the stockholders of the Memphis and Little Rock Railroad Company, held at Hopefield, Arkansas, fifteenth day of February, 1871. Said second mortgage deed provided, among other things, that if the coupons for the interest on said second mortgage bonds, or any part of them, were not paid at maturity, and if the majority in number and value of the holders of the coupons that might remain due and unpaid should elect to do so, they might postpone the sale of the property therein conveyed for the payment of said coupons, so due and unpaid, for the period of twelve months, and at the expiration of the said period the said Henry F. Vail should, upon the request in writing of a majority in number and value of the holders of the bonds and coupons therein secured, offer for sale, and sell all the property therein conveyed in the manner, upon the terms, and at the time therein provided; and after making the sale the said Henry F. Vail was directed and authorized to make proper conveyances of the property sold. Part of the property conveyed was subject to a former deed of mortgage, made on the first day of May, 1860, by the Memphis and Little Rock Railroad Company to Sam. Tate, R. C. Brinkley, and George C. Watkins to secure one million three hundred thousand dollars of first mortgage bonds and interest thereon. The said second mortgage, so made to the said Henry F. Vail, was duly and legally proved and placed upon record in the proper office for the registration of deeds in Pulaski county, Arkansas, and reference is here made thereto for a more full understanding of the provisions of said second mortgage, and the said Memphis and Little Rock Railroad Company duly and lawfully issued its second mortgage bonds of one thousand dollars each, with coupons for interest at-

tached thereto, to the amount of one million dollars, as provided for in said second mortgage, the company having failed to pay
48 the coupons for interest on said second mortgage bonds, and a majority in number and value of the holders of the coupons unpaid having elected to postpone the sale of the property for twelve months, and at the expiration of that period a majority in number and value of the holders of the said second mortgage bonds and coupons having requested the said Henry F. Vail, in writing, to sell said property, he, the said Henry F. Vail, by virtue of and pursuant to the power and authority therein and thereby conferred upon him, after due and lawful advertisement thereof, did, on the seventeenth of March, 1872, at Hopefield, in the State of Arkansas, sell all the property conveyed to him, as hereinbefore recited, when and at which said sale the said Stillman Witt, mentioned as the party of the first part herein, for himself and for the other parties mentioned herein as the parties of the second part, did become the purchaser of the said property at and for the price of fifteen thousand dollars, subject, however, to the lawful liens and incumbrances existing thereon; and the said Henry F. Vail, in further pursuance and execution of the power and authority conferred upon him in said second mortgage deed of the first day of March, 1871, did, on the seventeenth day of March, 1873, in consideration of the said sum of fifteen thousand dollars cash in hand, paid to him by the said Stillman Witt, convey to him all of the said property and franchises of the Memphis and Little Rock Railroad Company, subject to the lawful liens and incumbrances existing thereon, to be held by him and the said Stillman Witt in trust for himself and his associates, which said deed, so executed by the said Henry F. Vail to the said Stillman Witt, was duly recorded in the proper office for the registration of deeds in Pulaski county, Arkansas, and particular reference is here made to the same for a more full and exact understanding of the provisions of the same. Now the said Stillman Witt and the other parties hereto are the holders and owners of all of the said second mortgage bonds, and the coupons thereon, so issued
49 by the Memphis and Little Rock Railroad Company, amounting to one million of dollars of principal, and this deed is made for the purpose of declaring the respective rights, interest, and ownership in the said property so purchased by the said Stillman Witt for himself and the other parties hereto—that is to say:

The said Stillman Witt owns one hundred of said second-mortgage bonds, each for the sum of one thousand dollars, with the coupons thereon, and is entitled to hold, retain, and own one-tenth of said property; the said J. H. Wade owns one hundred of said second-mortgage bonds, each for one thousand dollars, with the coupons thereon, and is entitled to have conveyed to him and to hold and own one-tenth of said property; the said John J. Astor owns forty of said second-mortgage bonds, each for the sum of one thousand dollars, with the coupons thereon, and is entitled to have and own two-fifths of one-tenth of said property; the said Robert Lenox Kennedy owns thirty of said second-mortgage bonds of one thousand dollars each, with coupons thereon, and is entitled to have

and own one and a half-fifths of one-tenth of said property; the said A. A. Law owns twenty of said second-mortgage bonds of one thousand dollars each, with coupons thereon, and is entitled to have and own one-fifth of one-tenth of said property; the said George T. Adee owns ten of said second-mortgage bonds of one thousand dollars each, with coupons thereon, and is entitled to have and own one-hundredth ($\frac{1}{2}$ of $\frac{1}{5}$th of $\frac{1}{10}$th) part of said property; the said Hu. L. Brinkley owns three hundred of said second-mortgage bonds of one thousand dollars each, with coupons thereon, and is entitled to have and own three-tenths of said property; the said William B. Greenlaw owns three hundred of said second-mortgage bonds of one thousand dollars each, with coupons thereon, and is entitled to own and have three-tenths of said property; the said Sam. Tate owns one hundred of said second-mortgage bonds of one thousand dollars each, with coupons thereon, and is entitled to have and own one-tenth
50 of said property, and each of the said second parties having paid to the said Stillman Witt his *pro rata* share or proportion of said sum of fifteen thousand dollars, so paid by him to the said Henry F. Vail, in consideration thereof and of the premises, the said Stillman Witt doth by these presents release, convey, assign, transfer, quit-claim, and set over to each of the said second parties respectively the proportion, share, or interest in said property as hereinbefore recited and declared, subject, however, to the liens and incumbrances referred to in the said deed from the said Henry F. Vail to the said Stillman Witt, and all the parties hereto covenant and agree that each, his heirs, representatives, and assigns shall have and hold his above-recited proportion, share, or interest in said property.

In witness whereof, the parties hereto have set their hands and affixed their seals the day and year above written.

STILLMAN WITT, *Trustee.*	[SEAL.]
STILLMAN WITT.	[SEAL.]
J. H. WADE.	[SEAL.]
J. J. ASTOR.	[SEAL.]
ROBERT LENOX KENNEDY.	[SEAL.]
A. A. LAW.	[SEAL.]
GEORGE T. ADEE.	[SEAL.]
WILLIAM B. GREENLAW.	[SEAL.]
H. L. BRINKLEY.	[SEAL.]
SAM. TATE.	[SEAL.]

51 EXHIBIT F WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Proposition.

The Memphis and Little Rock Railway Company propose to the first mortgage bondholders of the Memphis and Little Rock Rail road Company to:

Issue first mortgage 8-100 currency, 30 year bond	$2,600,000
Issue second mortgage 6-100 currency, 25 year bond	$1,000,000
Issue income 7-100 currency, 20 year bond	$1,000,000
Issue stock	$5,000,000

It is proposed:

1. To place in the hands of the trustees, for distribution as hereinafter provided for, the following securities:

$2,400,000, first mortgage bonds.
300,000, second mortgage bonds.
500,000, income bonds.
300,000, stock.

2. To authorize said trustees to issue to the old first mortgage (*i. e.*, bond-holders) new first mortgage 8-100 bonds for the principal, coupons and funded interest bonds and coupons thereon, with interest on said coupons, and to hold said old securities for the specific benefit of the new bonds issued therefor until all legal questions are removed or settled satisfactory to said trustees; but said bonds are to be so printed across or defaced as not to be a marketable bond if said trustees deem it expedient.

3. To authorize said trustees to use, either in settlement of
52 rolling-stock debt, which is a lien on the property, or to return to the company *pro rata* as they pay any part of said debt, $200,000 of said first mortgage eight per cent. bonds.

4. To authorize said trustees to issue to the holders of Arkansas State bonds issued to the Memphis and Little Rock Railroad Company for each bond of $1,000, each $250 of first mortgage eight per cent. bonds; $250 second mortgage six per cent. bonds; $250 income bonds, and $250 for their face; and for the matured and maturing coupons up to and including April 1, 1875, income bonds for their face; provided said specified issues of Arkansas State bonds shall be presented on or before the first day of March, 1874, or at any other date the trustees may deem expedient. If said bonds should not be presented by that time, said trustees are authorized to issue up the limit of $1,200,000 Arkansas bonds for any other bonds of the State issued to railroads, such amounts of any of said new securities in payment therefor, as they may deem fit, not exceeding the *pro rata;* all such Arkansas bonds to be held in trust by said trustees for the purpose of paying the debt due by the Memphis and Little Rock Railroad Company to the State of Arkansas.

5. To authorize said trustees to use the coupons on said Arkansas bonds to pay the interest on the bonds due to the State of Arkansas that were issued to the Memphis and Little Rock Railroad Company as it may become due.

6. To authorize the said trustees, in case the State of Arkansas shall donate to the railway any State bonds or other things on condition of said company retiring the original $1,200,000 State bonds, to give to the parties who may have surrendered State bonds issued to the Memphis and Little Rock Railroad Company a *pro rata* proportion of such new donated bonds, upon their returning to the trustees for the use of the railway company the income bonds and stock

received by them on account of the principal of such surrendered bonds in equal proportions and amount.

53 7. The company agree with the trustees that they will reserve $3,000,000 of stock subject to their order, to be used in exchange for stock of the Memphis and Little Rock Railroad Company, said stock to be transferred to the Memphis and Little Rock Railway Company, as exchanges, and not to be exchanged at above par for the face of said stock in new stock at its par or face value.

8. The first mortgage bondholders to fund their interest on their bonds and funded interest bonds up to July 1, 1874, in first mortgage eight per cent. bonds at par; the new first mortgage bonds to bear interest from first of July, 1874, and first coupons to be paid first of January, 1875. The second mortgage bonds to bear interest from first of April, 1875, and the first coupons to be paid first of October, 1885; and both classes of bonds to have semi-annual coupons attached for the interest thereon, payable semi-annually, beginning with the dates aforesaid.

9. The expenses of executing this proposition to be borne by the railway company.

Acceptance.

NEW YORK, *October* 18, 1873.

"We whose names are hereto subscribed, holders of first mortgage bonds of the Memphis and Little Rock Railroad Company, and funded interest bonds of said company, for the amount of said bonds set opposite our names, do hereby accept the above and foregoing proposition of the Memphis and Little Rock Railway Company, and assent to the securities proposed, and agree to surrender our bonds and coupons to the trustees in accordance with said proposition, hereby modifying to that extent all former agreements made on the subject with the purchasers of said road under the second mortgage only to the extent named in the foregoing proposition: Provided, That nothing contained in our assent to this proposition shall be construed to deprive us of our rights and security, or as an ac-

54 knowledgment of satisfaction for the old securities, in such case to be surrendered to the trustees, until all questions, legal or equitable, shall be fully settled as to the legality of the new issue of bonds and the mortgage securing the same, as being a first lien. This agreement is to be executed, so far as the issuance and delivery to the trustees of the securities received, by the first day of January next.

"We hereby name and appoint as trustees in the foregoing proposition, James Tinker, of the city of New York; Wm. S. Pierson, of Windsor, Connecticut; R. K. Dow, of Claremont, New Hampshire, with full power to receive the securities named therein, and to act as trustees in this agreement, with the usual powers of trustees in such cases. The said company shall not be entitled to issue and retain the said $200,000 first mortgage bonds until the said $2,400,000 first mortgage bonds shall be delivered to the trustees, and also $275,000 of Arkansas State bonds indorsed by the Memphis and Little Rock

Railroad Company have been surrendered to the trustees for exchange on the terms specified.

(*Signed in Duplicate.*)

S. M. Swenson, $81,000,001 first mortgage bonds.
S. M. Swenson, $45,500 interest bonds.
C. M. Lampson & Co., $180,000 first mortgage bonds.
C. M. Lampson & Co., $28,560 interest bonds.
James Tinker, $2,000 interest bonds.
F. H. Cossitt, $100,000 first mortgage bonds.
F. H. Cossitt, $17,000 interest bonds.
J. N. Phelps, $20,000 first mortgage bonds.
P. Dow, for R. K. Dow, $15,000 first mortgage bonds.
R. K. Dow, $10,000 first mortgage bonds.
Edward Matthews, $322,000 first mortgage bonds.
Edward Matthews, $84,180 interest funded bonds.

55 EXHIBIT G WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Deed to Railway Company.

This indenture, made this seventeenth day of November, A. D. 1873, by and between Stillman Witt and Jeptha H. Wade, of Cleveland, Ohio, and John J. Astor, Robert Lenox Kennedy, and Abriel A. Law, and George T. Adee, of the city of New York, Wm. B. Greenlaw and Sam. Tate, of Memphis, Tennessee, and Hu. L. Brinkley, of the city of Little Rock, Arkansas, parties of the first part, and the Memphis and Little Rock Railway Company, a corporation duly organized under the laws of the State of Arkansas, party of the second part, witnesseth: That whereas the Memphis and Little Rock railroad, from Memphis, Tennessee, to Little Rock, Arkansas, and all of its rights, privileges, and franchises, and property, real, personal, and mixed, was sold on the seventeenth day of March, 1873, by Henry F. Vail, trustee, in the second mortgage of the Memphis and Little Rock Railroad Company, executed to him, the said Vail, as trustee, on the first day of March, 1871, recorded in the proper office for the record of deeds and mortgages, in the county of Pulaski, State of Arkansas; and whereas at said sale, made by said Vail, as trustee, as aforesaid, Stillman Witt, of Ohio, being the highest and best bidder, became the purchaser of said road and its entire property for the sum of fifteen thousand dollars, subject, however, to a prior lien in favor of the holders of the first mortgage bonds of said Memphis and Little Rock Railroad Company, for the sum of thirteen hundred thousand dollars and interest thereon, issued
56 on the first day of May, 1860, and secured by a mortgage or deed of trust, executed by said company, dated on said day, to R. C. Brinkley, Sam. Tate, and Geo. C. Watkins, to secure the payment of the principal and interest of said bonds, which is also recorded in the proper office for the record of deeds and mortgages in the county of Pulaski, and State of Arkansas. Said purchase was

also made subject to any and all liens that the State of Arkansas may have for twelve hundred thousand dollars of the bonds of that State, loaned to said company, to aid in the construction of said road, should it be found that such a lien exits, and also subject to any other debts that might prove to be a prior lien to the lien created by the mortgage securing the payment of said second mortgage bonds and the interest thereon, all of which is more fully set forth in the deed of said Henry F. Vail, trustee, to Stillman Witt, trustee for himself and associates, dated the seventeenth day of March, 1873, and also recorded in the proper office for the record of deeds in the county of Pulaski, State of Arkansas, to which reference is hereby made and made a part hereof. Reference is also made to the deed of Stillman Witt, trustee, to Stillman Witt, J. H. Wade, John J. Astor, Robert L. Kennedy, Abriel A. Law, Geo. T. Adee, Hu. L. Brinkley, Wm. B. Greenlaw, and Sam. Tate, dated March 29, A. D. 1873, and recorded in the proper office for the record of deeds in the county of Pulaski, State of Arkansas, and is hereby made a part hereof, showing the specific interest of said Witt, as trustee, deeded to the above-named parties of the first part; and whereas the Memphis and Little Rock Railway Company, party of the second part, is vested with the franchise to be a corporation under the laws of the State of Arkansas, and has become duly organized as such in conformity to the laws of said State, with capacity in its corporate charter to take, hold, and exercise other franchises, and particularly with the capacity to acquire, hold, maintain, and operate the continuous railway extending from Hopefield to Little
57 Rock, in the State of Arkansas, commonly known as the Memphis and Little Rock railroad or way, together with its appurtenances and equipments of every kind; and whereas the said Memphis and Little Rock Railway Company has agreed with the parties of the first part to buy the aforesaid railroad, its property and appurtenances, and as a portion of the consideration of the same the said Memphis and Little Rock Railway Company has made and delivered, and is to make and deliver, its bonds secured by mortgages to the parties of the first part and to trustees by the assent of said parties of the first part, which has been given for the purpose of taking up their indebtedness that is or was a lien or incumbrance on said railroad, charter, franchises, and property prior in lien to the said second mortgage, under which the sale hereto alluded to was made, as well as other liabilities, which said bonds and mortgages so made and delivered, and to be made and delivered, are as follows:

First. Two millions six hundred thousand dollars of its first mortgage bonds, bearing eight per cent. per annum interest, payable semi-annually on the first days of January and July in each year, and dated December 1, 1873, payable January 1, 1904, at the office of the New York Guaranty and Indemnity Company, in the city of New York, which said railway company has secured or is to secure by executing its first mortgage or deed of trust to the New York Guaranty or Indemnity Company of the city of New York, as trustee, on its railroad, charter, franchises, and property of every kind, including its income, and dated the first day of December, 1873.

Second. One million dollars of its second mortgage bonds, bearing interest at six per cent. per annum, payable semi-annually on the first days of April and October of each year, and dated on the second day of December, 1873, and payable on the first day of April, A. D. 1900, at the National Bank of Commerce, in the city of New York,
58 which said railway company has secured or is to secure by executing its second mortgage, dated the second day of December, A. D. 1873, to Henry F. Vail and E. B. Wesley, of New York, as trustees, on its entire road and property of every kind subject to the prior lien of the first mortgage before alluded to.

Third. One million dollars of its third mortgage and income bonds, dated December the third, A. D. 1873, payable on the first day of April, A. D. 1894, at the office of said National Bank of Commerce, in the city of New York.

The interest on said bonds is at such rate not exceeding seven per cent. per annum as the net earnings (in said mortgage or deed of trust defined) of said railway in each calendar year may suffice to pay, after satisfying the interest on the said first and second mortgage bonds of said company. This rate and character of interest is so payable up to the thirtieth day of June, 1880, and payable annually on the first day of October of each year, the first payment of interest to be made the first day of October, 1876, and the last annual payment on the first day of October, 1880. After that date the said railway company guarantees the full rate of seven per cent. per annum, interest payable semi-annually on the first days of April and October of each year. The first semi-annual coupon will be paid on the first day of April, A. D. 1881, and be for nine months' interest due that day.

And whereas the said railway company, for the residue of said consideration, has issued and delivered, or is to issue and deliver, to the said parties of the first part or to persons or trustees designated by them, thirty-two thousand five hundred shares of its capital stock, amounting in the aggregate to three millions two hundred and fifty thousand dollars;

And whereas the parties of the first part, for the consideration of the several mortgages or deeds of trust herein expressed and of the delivery of the bonds and stock aforesaid issued or to be issued as in the several deeds of trust or mortgages recited and provided herein by the said railway company to the parties of the first
59 part and fully set forth in the three several mortgages securing the same, and designated as first, second, and third and income mortgages hereinbefore described, have agreed to sell and convey to the said party of the second part all of the right, title, or interest they or either of them have in and to its railroad, rights, privileges, charter, franchises, and property of every name and kind:

Now, this indenture witnesseth that the parties of the first part, in consideration of the premises and one dollar to each of them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and do by these presents grant, bargain, and sell, convey and transfer, unto the said party of the second part all the right, title, and interest of them,

the parties of the first part, or either of them, acquired by virtue of the said second mortgage of the Memphis and Little Rock Railroad Company executed to Henry F. Vail, trustee, or the bonds secured thereby, and the sale of said property made by said Vail, as trustee, under said mortgage, and the deed of the said Vail, as trustee, to Stillman Witt, trustee, bearing date March 17, 1873, or acquired by virtue of the deed from Stillman Witt, trustee, to the parties of the first part of these presents, bearing date March 29, 1873, hereinbefore alluded to, of, in, and to all and singular the continuous railroad from Hopefield, Arkansas, to Little Rock, in the same State, and commonly known as the Memphis and Little Rock railroad or way, including all the railways, rights of way, charter, franchises, and property of every kind and nature whatever, which is more fully described in the deed of said Vail, trustee, to Stillman Witt, trustee, dated March 17, 1873, which is referred to for a more minute description, and made a part hereof; provided, nevertheless, and it is declared to be the true intent and meaning of these presents, that nothing herein contained shall be construed to express or imply any covenant by the parties of the first part, or either of them,
60 but that this instrument shall operate to convey on behalf of the parties of the first part all the estate, right, title, and interest in the railway and appurtenances, property, rights, franchises, and things and charters hereinbefore described, which the said parties or either of them might or do hold by virtue of the aforesaid second mortgage to Henry F. Vail, trustee, and the bonds secured thereby, and the aforesaid conveyances, and which the said parties of the first part, each for himself, and not one for the other, can lawfully convey and no more. And that the said estate and interest are hereby charged with and shall pass by virtue of these presents, subject to the payment of all liabilities incurred in respect to said railway or its business by the said parties of the first part during the possession of the said railway and property, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any way appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and also all of the estate, rights, title, interest, property, possession, claim, and demands whatsoever, as well in law as in equity, of the said parties of the first part, or either of them, of, in, and to the same, and every part thereof; to have and to hold the above described premises, subject as aforesaid, unto the said party of the second part and its successors and assigns to the only proper use and behalf of the said party of the second part and its successors and assigns forever. And the said party of the second part, for itself and its successors, in consideration of the premises and one dollar to it in hand paid by said parties of the *second* part to these presents, the receipt whereof is hereby acknowledged, hereby covenants and agrees with the parties of the first part to these presents and survivors and survivor of them, and the executor, administrators, and assigns of said survivor, that it, the said party of the second part and its successors, shall and will at all times hereafter perform and keep all and every

61 the conditions, covenants, and agreements and provisions contained in the several deeds of trust or mortgages hereinbefore mentioned, or either of them, to be by said party of the second part performed and kept.

In witness whereof the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be affixed to these presents, and the same to be attested by the signature of its president, and also by the signature of its secretary and treasurer, in evidence of the acceptance of the said party of the second part of the foregoing conveyance, and its execution of its covenants and agreements therein contained.

S. WITT.
J. H. WADE.
J. J. ASTOR.
ROBERT LENOX KENNEDY.
A. A. LAW.
GEORGE T. ADEE.
WILLIAM B. GREENLAW.
HU. L. BRINKLEY.
SAM. TATE.
SAM. TATE, *President.*
JOHN W. GOODWIN,
Secretary and Treasurer.

Signed, sealed, and delivered in the presence of—
C. B. WESLEY,
HOMER STRONG,
GEORGE B. FLY,
Witnesses as to S. Witt and J. H. Wade.

A. A. LAW,
CHARLES EDGAR MILLS,
Witnesses as to J. J. Astor and Robert Lenox Kennedy.
Witness:
GEORGE A. ADEE.
EDWIN M. ADEE.

62 PART OF EXHIBIT F WITH ANSWER.

R. K. Dow *et als.*, Trustee, *v.* M. & L. R. R. Co.

Contract Between Railway Company and State Bondholders.

The Memphis and Little Rock Railway Company, by Sam. Tate, its president, proposes to and hereby agrees with the holders of the bonds of the State of Arkansas, issued to the Memphis and Little Rock Railroad Company, that it will give them for each $1,000 of said bonds as follows: For principal—

$250 of its first mortgage 8 per cent. bonds, bearing interest from July, 1874.

$250 of its second mortgage 6 per cent. bonds, bearing interest from April, 1875.

$250 of its third mortgage income 7 per cent. bonds, bearing interest from April, 1875.

$250 of the stock of said railway company.

For the interest on said State bonds, one-half to July, 1874, and one-half to April, 1875—one-fourth in second mortgage 6 per cent. bonds, and three-fourths in third mortgage income 7 per cent. bonds.

These State bonds to be held by four trustees, two to be appointed by first mortgage bondholders, one by State bondholders, and one by the railway company, for the following purposes and benefits:

First. The coupons to be cut off and paid to the State of Arkansas, in satisfaction of the interest due and to become due to said State by the said railroad company, and such portion of the principal as shall be necessary to pay any additional tax levied
63 by the State on account of the issuance of said bonds by the State to the Memphis and Little Rock Railroad Company, unless said railway company prefer its being withheld.

The principal of said bonds to be paid to said State any time after January 1, 1881, by unanimous consent of said trustees, and shall be paid into said State at maturity of said bonds, so as to pay the debt owing to the State of Arkansas by said railroad or railway company, on account of the issuance of said bonds as aforesaid.

In case the State of Arkansas shall grant any subsidy to said railway or railroad company on condition of the return to the State of the State bonds issued to the Memphis and Little Rock Railroad Company, or any other adjustment of the debt due from said company on account of said bonds, the parties who may have surrendered State bonds under this agreement shall be entitled to said subsidy or adjustment on returning to the said trustees their third mortgage bonds and stock in equal proportions and amounts; if said subsidy shall exceed the third mortgage bonds and stock held by them, then they may surrender second mortgage bonds of said railway company for said excess.

The parties surrendering State bonds under this agreement to have the option of taking said subsidy or adjustment for two years after their issuance, on surrender of the bonds and stock as aforesaid, and said trustees are authorized to surrender said State bonds in payment of the debt due to said State as aforesaid, and receive said subsidy.

Failing to get any subsidy, the trustees shall surrender the State bonds to the State in payment of the debt of the company created for said bonds, at their maturity, unless sooner surrendered by unanimous consent of the trustees as hereinbefore provided.

All suits pending by Mott, Taintor, Wood, or others in interest of State aid bondholders, to be dismissed or brought to such termination as the trustees herein named shall judge expedient.
64 All expenses of the continuance of said suits at the instance of said trustees or the said railway company, as well as expenses of the issue, distribution, and custody of the stock and bonds under this agreement, and all expenses created by this trust shall be paid by said railway company.

In the event the State of Arkansas should before or after the

surrender of her said bonds make any grant, gift, or subsidy of land, money, or otherwise on account of the State aid bonds issued to the Memphis and Little Rock Railroad Company, it shall inure to the benefit of these bonds, and shall belong to the persons surrendering said bonds under this agreement, on the surrender of the bonds and stock as aforesaid within two years after said gift, grant, or subsidy.

And it is hereby understood and agreed that the company pledge the amount of State bonds now held by parties in interest of second mortgage bondholders to the above settlement and agreement to the amount of about *of about* $275,000.

And that a majority of holders of said State bonds shall on or before March 15, 1874, have given their assent to this agreement by signing the same.

Should it be thought desirable to extend the time beyond the fifteenth of March for the holders of any number of State bonds to sign this agreement, the trustees herein named shall have authority to extend the same.

We, whose names are hereto subscribed, being holders of the bonds of the State of Arkansas issued to the Memphis and Little Rock Railroad Company, agree to accept the foregoing proposition, and surrender our bonds to the trustees herein provided for, and receive the stock and bonds in lieu thereof, according to the terms and conditions of this agreement, for the amount of bonds set opposite our respective names, and we do hereby nominate and appoint Giles E. Taintor to be our trustee, as hereinbefore provided.

65 It is hereby agreed that the first mortgage bondholders and the railway company do hereby appoint James Tinker, R. K. Dow, and William S. Pierson trustees, as hereinbefore provided. In case of any vacancy, by death or otherwise, such vacancy shall be filled by the survivors, but in case of vacancy of trustee appointed by State bondholders, subject to the assent of a majority of such bondholders.

(Signed) MEMPHIS AND LITTLE ROCK RAILWAY COMPANY,
By SAM. TATE, *President.*

Dated New York, February 11, 1874.

66 EXHIBIT H WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Railway First Mortgage Trust Deed.

This indenture, made and executed this first day of December, A. D. eighteen hundred and seventy-three, by and between the Memphis and Little Rock Railroad Company, a corporation duly organized under the laws of the State of Arkansas, party of the first part, and the New York Guaranty and Indemnity Company of the city and State of New York, party of the second part, witnesseth that: Whereas the Memphis and Little Rock Railroad Company did, on the first day of May, A. D. 1860, make, execute, and deliver to Sam. Tate, Robert C. Brinkley, and George C. Watkins a mortgage or trust deed, which is recorded in the proper office of record for deeds

and mortgages of the county of Pulaski and State of Arkansas, to secure the payment of the bonds of said company to the amount of thirteen hundred thousand dollars of the principal and the interest to accrue thereon, for money borrowed for the construction of the railroad of said company in the State of Arkansas; and

Whereas a large sum has become due to the holders of said bonds for arrears of interest thereon; and

Whereas the said railroad company became indebted to various other persons and corporations for moneys used in the construction and equipment of said railroad; and

Whereas the said Memphis and Little Rock Railway Company, party of the first part, has become the owner, by purchase, of the railroad, charter, franchises, lands, and all other property of whatsoever kind and nature, of said Memphis and Little Rock Rail-
67 road Company, subject, nevertheless, to the lien of said mortgage or deed of trust securing the payment of said thirteen hundred thousand dollars of bonds and the accrued interest thereon, and to the payment of further sums due, as aforesaid, on account of the construction and equipment of said railroad, to an amount exceeding, in all, of two millions six hundred thousand dollars; and

Whereas the stockholders of said Memphis and Little Rock Railway Company, at a general meeting thereof duly held, have, for the purpose of procuring an extension of time for the payment of said bonds and arrears of interest thereon, and the extension and settlement of the other sums of money due as aforesaid, authorized the issue of bonds, bearing even date herewith, by the said railway company, to the amount of said two millions six hundred thousand dollars, and interest to accrue thereon, at the rate of eight per cent. per annum, and the securing of the payment of the same by mortgage or deed of trust, as hereinafter set forth; and

Whereas the said company have issued, or prepared for issue, for the purpose and by the authority aforesaid, twenty-five hundred bonds of one thousand dollars each, which are numbered from 1 to 2,500 inclusive, and four hundred bonds of two hundred and fifty dollars each, which are numbered from 2,501 to 2,900, inclusive, amounting, in the aggregate, to the sum of two millions six hundred thousand dollars, all bearing even date herewith, and all of like tenor, and substantially in the following form:

"Know all men by these presents, that the Memphis and Little Rock Railway Company hereby acknowledges itself indebted and promises to pay to ———, or bearer, at the office of the New York Guaranty and Indemnity Company, in the city of New York, on the first day of January, A. D. 1904, one thousand dollars of lawful money of the United States of America, with interest thereon from the first day of July, 1874, at the rate of eight per cent. per
68 annum, payable semi-annually, on the first days of January and July in each year, on the presentation and surrender at the office of the said New York Guaranty and Indemnity Company of the interest coupons hereto annexed as they severally fall due. And the said railway company hereby agrees with the holder of this

bond that if default shall be made for six months in the payment of any of the interest coupons hereto annexed, that the principal sum of this bond shall immediately become due and payable.

"This is one of a series of twenty-nine hundred bonds, twenty-five hundred of which, numbered from 1 to 2,500, inclusive, are for one thousand dollars each, and four hundred, numbered from 2,501 to 2,900, inclusive, are for two hundred and fifty dollars each, amounting, in the aggregate, to twenty-six hundred thousand dollars, all of which bonds are secured by a mortgage or trust deed, bearing even date herewith, which has been duly executed by said company to the New York Guaranty and Indemnity Company, as trustee, conveying to it, among other things, as more particularly set forth in said deed, all the franchises, road, rolling-stock, income, lands, and other property of said company.

"This bond shall pass by delivery, and shall not become obligatory until authenticated by the certificate of said trustee.

"In witness whereof, the said railway company has caused this bond to be signed by its president and secretary and treasurer, and caused its corporate seal to be hereunto affixed, and hath also caused the interest coupons hereto annexed to be signed by its treasurer, under and in conformity to said mortgage, this the first day of December, A. D. 1873.

"The New York Guaranty and Indemnity Company hereby certifies that this bond is one of a series amounting, in the aggregate, to $2,600,000, secured by the mortgage or trust deed, dated December 1, 1873, within mentioned, and the said mortgage or deed of trust has been duly recorded."

69 And whereas said railway company has determined to secure the payment of said bonds, with the interest thereon, in the manner herein provided:

Now, therefore, the said Memphis and Little Rock Railway Company, party of the first part, in order to secure the due and punctual payment of the before-mentioned twenty-nine hundred bonds, and the accrued interest thereon, and for and in consideration of the premises and of the sum of one dollar paid by the party of the second part to the party of the first part, the receipt whereof, at and before the ensealing and delivery of these presents, is hereby acknowledged, hath granted, bargained, sold, aliened, remised, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, convey, and confirm, unto the said New York Guaranty and Indemnity Company, party of the second part, as trustees, and in trust, and its successor or successors, and his or their survivor or survivors and assigns forever, all and singular the railroad and rights of way from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden, and State of Arkansas, to Little Rock, in the county of Pulaski, and State of Arkansas, with the connections of said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad, and any railroad depots or rights of way in the city of Memphis, State of Tennessee, belonging to said railway company, and all rails,

trestles, ties, tracks, side-tracks, switches, bridges, depots, stations, buildings, water-tanks, machine shops, car houses, engine houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments that the said railway company, party of the first part, now own or may hereafter acquire or become entitled to in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock, and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of accounts, records, muniments, and evidences of title
70 and choses in action which are now owned or may hereafter be acquired by said railway company, party of the first part, and also the charters, franchises, rights, privileges, and immunities, including the right or franchise to be a corporation, which the said railway company now own or possess, or may hereafter own or acquire, in the States of Arkansas or Tennessee, or elsewhere; and also all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said railway company from its railroad or other property, or in any way whatsoever; to have and to hold all and singular the said premises, properties, and things, and rights and privileges, immunities, charters, and franchises, with their appurtenances, hereby conveyed or intended to be conveyed to said party of the second part, and its successor or successors, and his or their survivor or survivors and assigns, forever.

And the said Memphis and Little Rock Railway Company hereby covenants with the party of the second part that it is lawfully seized and possessed of the said granted property, and has good right to convey the same in manner and form as aforesaid, and that the same is clear of all incumbrances whatsoever, except the above described mortgage of the Memphis and Little Rock Railroad Company, and as hereinbefore stated, and that it will forever warrant and defend the title thereto against all lawful claims whatsoever; provided, however, that the conveyance is upon the conditions following, to wit:

1. That so long as the said party of the first part shall not make default in the payment of either principal or interest on any of the aforesaid bonds or coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and conditions of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof.

71 Second. The said party of the first part does hereby covenant and agree that it may pay all taxes, charges, rates, levies, and assessments which are now or may hereafter be levied, imposed, or assessed on any part or all of the property or franchises hereby conveyed or intended to be conveyed, and will take care of and preserve the same, and will at its own cost do all acts necessary to be done to keep valid the lien hereby created upon all the property and franchises hereby conveyed or intended to be conveyed, and will, at

any and all times, upon the request of the party of the second part, or its successors, make, execute, acknowledge, and deliver, under its corporate seal, in due form, all such other deeds of assurance and mortgages as may be requested by said party of the second part, for the better carrying into effect of the true intent and meaning of these presents.

Third. It is agreed by the parties to this indenture that the party of the first part, so long as there shall be no default in the payment of the principal or the interest on the bonds issued under this trust, shall have the right to sell and convey any or all of the lands of the said party of the first part, granted by the United States or the State of Arkansas in aid of said railroad, or otherwise acquired by said company, and not necessary or convenient to the operating of the same, and shall apply all the proceeds of the said lands for the term of three years to the purchase of cars, engines, and equipments for its said railroad, and for betterments to said road, and after the expiration of said term shall apply one-half of the net proceeds as aforesaid to the betterment or equipment of said railroad, and the other half of said proceeds shall be paid to the party of the second part, to be by it invested in the purchase of the bonds secured or intended to be secured by this deed of trust at the lowest market rate, said purchased bonds and the coupons annexed to be canceled by said party of the second part as soon as purchased.

72 Fourth. Said railway company will, from time to time, as incurred, pay all charges, costs, expenses, and compensations of the said party of the second part, and its successor or successors and survivors, in and about or for the execution of said trust, and will in all things keep the said trustee, or its successors, fully indemnified and saved harmless of, from, and against all costs, damages, charges, and expenses which said trustee, or its successors, may sustain or be put to in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages as may arise from any culpable act or neglect of said trustee. And said railway company, party of the first part, will cause this deed to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to this conveyance.

Fifth. In case default for the space of sixty days shall be made in the payment of any of said interest coupons, or of the principal sum of any of said bonds, as they shall respectively fall due, the said party of the second part, its successor or successors, and his or their survivor or survivors, on the written request of a majority in interest of the holders of said bonds, may and shall enter into and upon and take possession of and operate all and singular the said railroad, and all other property, real, personal, or mixed, hereinbefore conveyed, or intended to be conveyed, and take and receive the income and profits thereof; and if any of the interest coupons, or the principal sum of any of the bonds aforesaid, shall be or remain unpaid for the space of six months from the time or times they respectively fall due or payable, the principal sum of said bonds shall become due and payable forthwith; and the said party of the second part, its

successor or successors, and his or their survivor or survivors, on the written request of the holders of one-sixth part or more in interest of said bonds, may and shall enter in and upon and take possession of and operate all and singular the said railroad, and all other property, real, personal, or mixed, hereinbefore con-
73 veyed, or intended to be conveyed, and take and receive the income and profits thereof, and may and shall sell all and singular said railroad and lands, and all other property, real, personal, or mixed, and all the charters, rights, priviles, immunities, franchises and choses in action of said railroad company, party of the first part, hereinbefore conveyed, or intended to be conveyed, and execute and deliver to the purchaser or purchasers deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title and interest, whether legal or equitable, of said party of the second part, and of said railway company, party of the first part, in fee simple, absolute, free of equity or redemption of, in or to said railroad lands, property, charters, rights, privileges, immunities, and franchises, and every part and parcel thereof, and said deeds and conveyances shall forever bar and estop said railway company, party of the first part.

And the said party of the first part hereby covenants and agrees that said party of the second part, its successor or successors, and his or their survivor or survivors, may make said sale as aforesaid, in the city of Little Rock, or in any town on the line of their said railroad, and with or without entry on said conveyed premises, and may make sale as aforesaid by or through its, his, or their agents or attorney in fact with the same force and effect as if made by it, him, or them, in person or through their proper officer; and the said party of the first part hereby waives the benefit of any stay, extension, appraisement, or appropriation laws which may now or hereafter exist. But, before any sale shall be made, notice of such intended sale shall be published, once in each week, for not less than four consecutive weeks, in one newspaper published in the city of Little Rock, Arkansas, and in one newspaper published in the city of Memphis, Tennessee.

And the said party of the first part hereby covenants and agrees that said party of the second part may adjourn said sale as
74 many times and for such length of time as they see fit, and any sale made on any adjourned day shall be of the same force and effect as if made on the day first appointed.

And the proceeds of such sale, if made for cash, after paying the costs, charges, and expenses of said party of the second part, or its successors, and of its or their agents or attorneys at law or in fact, incurred in and about the said trust and the said foreclosure, sale, and conveyance, shall be distributed *pro rata* to the holders of the bonds, without regard or priority of issue, and coupons secured by this trust, but neither in the case of a sale for money, nor in the case of any other sale, judicial or otherwise, shall any of the coupons or interest warrants from said bonds be entitled to or share any of the proceeds of such sale, unless the same are held and owned by the actual holders and owners of the bonds to which said coupons

were respectively attached at the issue of said bonds. And it is expressly agreed that such coupons, as may be held by any other person than the actual owner or holder of the bonds to which they were respectively originally attached, shall be considered merely as an unsecured promissory note of said railway company, and shall not be entitled to the security of this deed of trust. And any surplus after any sale for money, and after making full payment and satisfaction of all the aforesaid bonds, coupons, and interest, and the costs, charges, and expenses as aforesaid, shall be paid over to the party of the first part.

Sixth. And it is further covenanted and agreed by and between the parties hereto, that in case of a sale, whether judicial or otherwise, of said premises embraced in this mortgage, the amount of the bid or purchase-money on said sale may be paid and satisfied in whole or in part by the outstanding bonds or coupons, save the detached coupons aforesaid, or any of them secured thereby, and said bonds or coupons shall be received in whole or in part payment and satisfaction by the said trustee, its successor or successors, and his or their survivor or survivors, according to their value, to be ascertained and determined by the net amount arising from said sale. And it is further covenanted and agreed, by and between the parties hereto, that in case of any sale, judicial or otherwise, of the premises embraced in this mortgage, and the holders of a majority in interest of the then outstanding bonds secured by this mortgage shall in writing request the said trustee, or its successor or successors, or his or their survivor or survivors, so to do, it, they, or he is authorized to purchase the premises embraced herein for the use and benefit of the holders of the then outstanding bonds and coupons secured by this mortgage. And that, having so purchased said premises, the right and title thereto shall vest in said trustee or trustees, and no bondholder shall have any claim to the premises or to the proceeds thereof, except for his *pro rata* share of the proceeds of said premises, as represented in a new company or corporation to be formed by a majority in interest of said bondholders for the use and benefit of the holders of the bonds secured hereby. And whenever the holders of a majority of said bonds shall have organized a new company or corporation for the use and benefit of all the holders of the bonds secured by this mortgage, the said trustee or its successor or successors, or his or their survivor or survivors, shall reconvey the premises so purchased by it, him, or them to said new company or corporation.

Seventh. In order to supply, without the proceedings on the part of the bondholders hereinafter provided for, the vacancy that may be caused by the removal, resignation, or disability of the said party of the second part, the said New York Guaranty and Indemnity Company, it is hereby agreed that upon the happening of either of said events, Wm. S. Pierson, of Windsor, Connecticut; Watson Matthews, of New York, and R. K. Dow, of Claremont, New Hampshire, or the survivor or survivors of them, shall become the trustee or

trustees in the place of said New York Guaranty and Indem-
76 nity Company, with the same powers and effect as if they or he were originally made the party of the second part. And it is further agreed that said New York Guaranty and Indemnity Company may resign and discharge itself of this trust by and with the consent of the majority in interest of said bondholders, and that said Pierson, Dow and Matthews, or either of them, may also resign and be discharged in like manner.

And it is further agreed that in either of the district courts of the United States for the district in which is situated the city of New York, in the State of New York; the city of Memphis, in the State of Tennessee, and the city of Little Rock, in the State of Arkansas, on a petition of a majority of the outstanding bondholders for the removal of any trustee or trustees, the said court may remove the said trustee or trustees; and that in case of death, resignation, or removal of any trustee a successor or successors shall be appointed by said court on a petition of a majority in the interest of the holders of the then outstanding bonds secured by this mortgage; and the said trustee or trustees so appointed shall thereupon become vested with all the powers, authorities, and estates granted to or conferred upon said party of the second part by these presents, and all the rights and interest requisite to enable them to execute the purposes of this trust, without any further assurance or conveyance.

Eighth And the party of the first part hereby agree that said party of the second part, its successor or successors, or his or their survivor or survivors, may appoint and employ, at the expense of the said trust estate, all such attorneys, counselors, agents, clerks, cashiers, bookkeepers, engineers, or other agents as may be reasonably necessary in the execution of any of the trusts herein or hereby declared or created, and may fix their compensation, and shall not be answerable for the defaults or other misconduct or neglects of such attor-
neys, counselors, cashiers, clerks, bookkeepers, engineers, or
77 other agents, unless chargeable with culpable negligence in their selection; and further, that neither of said trustees shall be answerable for the acts, omissions, or defaults of his associate or associates, nor shall either of them, or their successors or successor, or survivors or survivor, be responsible for anything short of gross negligence or willful default in the discharge of its duties.

And the party of the first part hereby declares and agrees that where the word trustee or trustees, or party of the second part, are hereinbefore mentioned, it shall mean and be construed to mean the party of the second part, and its successor or successors, whether named in this indenture or appointed by the court, and his or their survivor or survivors and assigns; and said party of the first part further agrees that the lithographed signature of its treasurer upon the coupons attached to the bonds hereinbefore mentioned shall be deemed the written signature of its said treasurer, and of equal force and effect.

In witness whereof, the said Memphis and Little Rock Railway Company hath caused this indenture to be subscribed by its presi-

dent and secretary and treasurer, and hath caused its corporate seal to be hereunto affixed, on the first day of December, A. D. 1873.

SAM. TATE, *President.*
JOHN W. GOODWIN,
Secretary and Treasury.

Witness:
WILLIAM H. CLARKSON,
JOHN F. TANNER,
As to Samuel Tate, President.

And the said party of the second part, The New York Guaranty and Indemnity Company, for the purpose of signifying its acceptance of the trust herein and hereby created, hath caused this
78 to be signed by its president and secretary, and hath caused its corporate seal to be hereunto affixed this second day of December, A. D. 1873.

THE NEW YORK GUARANTY AND INDEMNITY COMPANY,
By JAMES P. WALLACE, *President.*
P. J. OGDEN, *Secretary and Treasurer.*

Witness:
WILLIAM H. CLARKSON.

79 EXHIBITS J & K WITH ANSWER.

R. K. DOW *et als.*, Trustees, *v.* M. & L. R. R. Co.

Decree of Foreclosure and Commissioner's Deed.

Know all men by these presents, that whereas, in the cause in equity pending in the circuit court of the United States for the eastern district of Arkansas, wherein William S. Pierson, Watson Matthews, R. K. Dow, R. C. Brinkley, and Sam. Tate were complainants and the Memphis and Little Rock Railroad Company, The Memphis and Little Rock Railway Company, Henry F. Vail, Edward B. Wesley, Jeptha H. Wade, and William M. Farrington were defendants, on the twenty-first day of November, A. D. 1876, it was by said court decreed as follows:

Now on this day come the plaintiffs, by U. M. Rose and B. C. Brown, their solicitors, and also come the defendants, by George A. Gallagher and S. R. Cockrill, their solicitors, and this cause is now, by consent, submitted on final hearing on the pleadings, evidence, and orders and decrees heretofore made and rendered herein; and the court having heard argument of counsel, and being now fully advised in the premises, and all and singular the premises being considered, the court finds the following facts, which are here recited for the purpose of a more perfect understanding of the decree.

That on the first day of May, 1860, the Memphis and Little Rock Railroad Company issued thirteen hundred bonds, dated on that day, to bear interest at the rate of eight per centum per annum, payable semi-annually in the city of New York; that in order to secure

the payment of the said bonds, the said Railroad Company
80 the same day executed its certain deed of mortgage to Sam. Tate, Robert C. Brinkley, and George C. Watkins, trustees, conveying to them the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite the city of Memphis, in the State of Tennessee, to the city of Little Rock, in the State of Arkansas, its road-bed, right of way, and all works and rolling-stock of or belonging to said company, together with the charter by which said company was incorporated and under which it was organized, and all the rights, privileges, and franchises thereof, and also all the lands lying in the State of Arkansas granted to said Railroad Company by said State of Arkansas by the act of the Legislature of said State, approved January 19, 1855, and by the act of the Congress of the United States, approved February 9, 1853, which the said company then owned, the same being set forth in a schedule thereto annexed, the said mortgage being upon condition that if the said Railroad Company should pay the said bonds and interest as prescribed in the said bonds, then that the said conveyance should be null and void, the said Railroad Company reserving the privilege of selling any of said lands and applying the proceeds thereof to the building, completing, and equipping said road; and that if the said interest should not be paid the said trustees should sell the said lands and out of the proceeds pay any of the said interest that might be overdue, and that the said lands might be sold in like manner for the payment of the principal of said bonds when the same should fall due; and that if the proceeds of the said sale should not suffice to pay off the principal or interest of said bonds, the said trustees might, on a written request of a majority in number and value of those owning said bonds, take possession of said railroad, its depots, road-bed, right of way, and privileges, rolling-stock, and everything pertaining to said road, and should operate said road for the term of five years thereafter and apply the net earnings of said road made during that time for the comple-
81 tion of said road if the same should be incomplete, and should apply the surplus of such earnings to the payment of the interest or principal of said bonds as the same might become due, and at the end of that time said trustees might, upon a like request, sell the property aforesaid for the payment of the said principal and interest, which mortgage being prior in date will hereafter be referred to and designated in brief as the first mortgage.

And the court finds that after the execution of the said first mortgage said George C. Watkins departed this life, and the two remaining trustees resigned their said trust, and that this said court, sitting in chancery, appointed Robert C. Brinkley, Sam Tate, and William S. Pierson, parties to this suit, as trustees to fill said vacancy, who accepted said trust, and still continue to act as such trustees; and that the said trustees cannot take the possession of the said road and other property mentioned in said first mortgage, and that they have failed and refused to do so.

And it further appears that after the execution of said first mortgage, the said Memphis and Little Rock Railroad Company issued

certain other bonds which were secured by another mortgage to Henry F. Vail, which were subsequent in time and right to said first mortgage, and which included the same property above described, and also other property, and that afterwards the said property was sold under a power of sale contained therein by the said Vail, and the purchasers at said sale reorganized said corporation under the laws of Arkansas, under the name of the Memphis and Little Rock Railway Company, and that since that reorganization, which occurred in 1873, the said road has been operated by said Memphis and Little Rock Railway Company until the same was placed in the hands of the trustees and receiver by order of the court made in this cause.

It further appears that the said Memphis and Little Rock
82 Railway Company, on the sixteenth day of October, 1873, proposed to said first mortgage bondholders to make a first mortgage on the property of said railway company to secure certain bonds issued by it for the aggregate sum — $2,600,000, and to place said bonds in the hands of certain trustees for distribution, authorizing said trustees for distribution to issue to the holders of said bonds secured by said first mortgage the new bonds of said railway company, part of said $2,600,000, said bonds issued by said railroad company secured by said first mortgage and their coupons to be held for the specific benefit of the new bonds of said railway company issued therefor.

And it further appears that the said Memphis and Little Rock Railway Company executed its mortgage dated December 1, 1873, by which it conveyed to the New York Guaranty and Indemnity Company, as trustees, and its successors forever, all and singular the railroad aforesaid, and rights of way, from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden, and State of Arkansas, to Little Rock, in the county of Pulaski, and State of Arkansas, with the connections of said railroad with the Cairo and Fulton Railroad, and the Little Rock and Fort Smith Railroad, and any railroad depots and rights of way in the city of Memphis, State of Tennessee, belonging to said railway company, and all rails, trestles, ties, tracks, side tracks, switches, bridges, depots, stations, buildings, water-tanks, machine shops, car houses, engine houses, work shops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments that said railway company then owned or might thereafter acquire or become entitled to in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of account, records, muniments, and evidences of title, and choses in action which were then owned or might be thereafter acquired by said railway company; and also the char-
83 ters, franchises, privileges, and immunities, including the right or franchise to be a corporation, which said railway company then owned or possessed, or might thereafter own or acquire in the States of Arkansas or Tennessee, or elsewhere; and also all

the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said railway company from its railroad or other property, or in any other way whatever; it being provided that if the said railway company should pay off the said $2,600,000 of bonds according to the tenor and effect thereof, the said conveyance should be null and void; which mortgage will be hereinafter, for brevity, specifically referred to and designated as the second mortgage.

And the court further finds that the said New York Guaranty and Indemnity Company afterwards resigned its position as trustee under said second mortgage, and that the plaintiffs in this suit, Pierson, Dow, and Matthews, were appointed to act as trustees in its stead, and that they are now acting as such.

The court finds that the majority of the holders of the bonds secured by said first mortgage surrendered the same under the said proposition of said railway company, and accepted in lieu thereof the bonds secured by said second mortgage, the bonds thus remaining in the hands of the said trustees for distribution, for the specific benefit of the bonds issued by said railway company, and secured by said second mortgage; but that there now remain outstanding a portion of the bonds of said railroad company secured by said first mortgage which have not been surrendered to said trustees for distribution.

The court further finds that there is due on the bonds issued by said railroad company, and secured by said first mortgage, certain interest represented by coupons and interest thereon, issued with the said bonds, amounting to the sum of $1,088,348.80 on the first day of November, 1876, and interest at six per cent. on said sum
84 up to date of this decree; and that there is due on the bonds of the said Railway Company interest falling due January 1, 1875, July 1, 1875, January 1, 1876, and July 1, 1876, amounting to the sum of $416,000, secured by said second mortgage; and that by the terms of said second mortgage the principal sums of said bonds mentioned, amounting in the aggregate to the sum of $2,600,000, has become payable and is now due:

Now, therefore, it is by the court ordered, considered, and decreed that the defendant, the Memphis and Little Rock Railroad Company, pay into this court before the sale hereinafter decreed the said sum of $1,088,348.80, with interest to date of this decree at six per centum per annum, and that the said Memphis and Little Rock Railway Company pay into court within the same period the said sum of $3,016,000; and that both of said sums bear interest from this date until paid at the rate of eight per cent. per annum on the principal of said bonds, and at the rate of six per cent. per annum from this date until paid on the interest due thereon.

And it is further ordered that the said Memphis and Little Rock Railroad Company and the said Memphis and Little Rock Railway Company pay all the costs of this suit, in proportion to the said amounts due from them respectively as above decreed, and that unless the said payments be made within the time aforesaid by said mortgagors respectively, their respective equities of redemption in

and to said property as described in said respective mortgages be forever barred and foreclosed.

And it is further decreed that the commissioner hereinafter named shall sell the land described in said first mortgage, and which has not heretofore been sold by said railroad company, in accordance with the power contained in said first mortgage, in one lot, and that, if that shall not suffice to pay the said amount, he immediately proceed to sell in one lot the railroad and other property embraced in said first mortgage, which sale shall carry with it all the
85 rights of property, charter, and franchises as set out and conveyed under the said first mortgage, and that any sale had under this decree shall relate back to the date of said first mortgage, and the money arising from said sale shall be distributed among the holders of the coupons secured by said first mortgage that have not been surrendered on the basis of said first mortgage alone, so that each holder of an overdue coupon, secured by said first mortgage, which has not been thus surrendered, shall receive of the purchase-money arising from said sale a due proportion of said purchase-money as computed from the entire issue of said bonds, and that the residue of said purchase-money shall be distributed among the holders of the bonds secured by said second mortgage equally, in proportion to the amounts of said second mortgage bonds by them respectively held. But it is ordered that any one holding any bonds or coupons secured by said first mortgage not yet surrendered may surrender the same to the master of this court at any time prior to the sale herein decreed; and that upon such surrender he shall have the same benefit thereof under this decree as if said surrender had been made at any previous time; and that in making the said sale the said commissioner shall require any person bidding on said property to deposit with him a sufficient sum of money to pay off the debts due from the receiver herein as reported under this decree, or else to deposit a majority in value of the bonds and coupons secured by said first mortgage as a pledge of his good faith as a bidder at such sale, and the commissioner shall not cry the bid of any person not complying with this requirement. And any person having made such a deposit, who shall bid in such property, shall forfeit his deposit if he shall not comply with his final bid in case the property should be knocked off to him, and the sum thus forfeited shall be applied to the payment of the debts created or assumed by the receiver herein. And the purchaser at
86 said sale and at the sale hereinafter mentioned shall make payment under his purchase or purchases within ten days after the day of said sale.

It is further decreed that if there shall be any surplus of the proceeds of said sale after the payment of the sum above decreed for interest against the Memphis and Little Rock Railroad Company the said surplus shall be paid into court, and shall be held for the payment of the unpaid principal on all of said bonds secured by said first mortgage, and such interest thereon as has not yet accrued; and that in the payment of said surplus the unpaid bonds secured by said first mortgage shall be received for the proportion that the

principal of each bond shall bear to said surplus, and to the whole amount of the principal of said bonds, amounting to the sum of $1,300,000; and that the bonds thus brought in for participation in said surplus by the purchaser at said sale shall be severally indorsed by the master as credited with the said *pro rata* part of said surplus as of the date of said sale, and shall thereupon be returned by him to the purchaser; and that as for any residue of said surplus said purchaser shall pay the same into court in money, and for any final bid at said sale the overdue coupons secured by said first mortgage shall be received in lieu of money for the amount of the distributive share of said purchase-money which shall be due on such coupons, and the owners or holders of said first mortgage bonds and coupons that have been deposited in court shall be at liberty to use the same in said bidding and in making said payment equally with other holders of like bonds.

It is further decreed that immediately after the said sale of the said property embraced in said first mortgage the commissioner shall proceed to sell, in one lot, the property embraced in said second mortgage, which shall relate back to the date of said second mortgage. And the proceeds of said sale shall be distributed equally among the holders of the bonds secured by said second mortgage, according to the amounts due them respectively, after the bonds issued
87 under said second mortgage shall have been credited with their *pro rata* share of the proceeds of the sale of the property embraced in said first mortgage. And it is decreed that both of these sales shall be made subject to the payment of all debts created and assumed by the receiver herein, except such debts as the receiver may have incurred for money by him borrowed under the orders of this court, and also subject to any and all suits that may be pending at the time of the said sale against said receiver, and that if different persons shall become purchasers under said sales that the said burden shall be borne by them in the proportion of their respective bids.

And it is directed that, in order that all bidders may have the opportunity of knowing the amount of the liabilities that will thus fall upon the purchaser or purchasers of said property, the receiver herein shall make out and file in this cause, at least ten days before said sales, a statement of all of said debts thus imposed on said property, and of all suits pending against him and the nature and objects of the same.

And it is further decreed that a lien be, and the same is, retained on all the property for the payment of the said debts, and any future liabilities of the receiver which are thus made a charge on the same, for the benefit of the holders of said demands, which may be enforced for their benefit as against the said purchaser or purchasers by any appropriate proceedings, and that this lien shall operate as an indemnity for the said receiver.

It is further decreed that said sales be made on a day to be fixed by said commissioner between the hours of ten o'clock a. m. and four o'clock p. m., and if not completed on said day shall be continued from day to day until completed, between the same hours, and shall

be for cash in hand to the highest bidder, and shall be made at the door of the building in which this court is held, on the corner of Fourth and Main streets, in the city of Little Rock, not less than sixty days from this date, two months' notice thereof having
88 been first given by advertisement in the Arkansas Gazette or Evening Star, newspapers published in Little Rock, the Daily Memphis Appeal or Memphis Avalanche, newspapers published in the city of Memphis, Tennessee, and the Evening Post or Commercial Advertiser, newspapers published in the city of New York.

And regarding the sale of the property embraced in said second mortgage the following directions are given: It being expressly stipulated and provided in said second mortgage deed that in case of any sale, judicial or otherwise, of the premises embraced in said mortgage, that the trustees thereof for the time being, upon the request of the holders of a majority in interest of the outstanding bonds, shall buy in, and that in such case no bondholder should have any claim to the premises, or to the proceeds thereof, except for his *pro rata* share of the proceeds of said premises as represented in a new company or corporation to be formed by a majority in interest of said bondholders for the use and benefit of the holders of the bonds secured by said second mortgage.

It is, therefore, ordered that, if said trustees shall be so requested and shall bid for said property, they shall pay into court a sufficient sum to pay the costs of sale and this suit, including counsel fees, allowances to trustees, to the commissioner for sale and master of this court. And for the residue, their bid to the amount due and ordered to be paid by this decree shall be accepted by said commissioner, and he shall forthwith execute a deed conveying the purchased property to said trustees for and upon the trusts expressed in said second mortgage; that is to say, upon trust that they will convey the same to such new company or corporation as may be organized by the holders of a majority in interest of said bonds upon demand thereof. And it further appearing that by the said second mortgage it is provided that in case of sale no coupons or interest warrants from said bonds shall be entitled to share therein unless such
89 coupons are at the time held and owned by the actual owners and holders of the bonds to which coupons were respectively attached at the issue of such bonds.

And further, that in case of sale the bid might be paid in whole or in part by or with the outstanding bonds or coupons, such as might be detached and held by others than the owners of the bonds from which they were taken excepted, according to their value, to be ascertained and determined by the net amount arising from said sale; it is therefore ordered that in case any person or persons other than said trustees shall purchase said property, such purchasers shall pay in cash the same sum as is provided in case of a purchase by the trustees, and for the residue may deliver, and said commissioner shall accept in payment, any of said bonds and past due attached coupons at their value, to be ascertained by the proportion which the amount of said purchase-money bears to the whole amount of the principal and past due interest on said bonds as found by said

decree; but no detached coupons shall be so received without proof that such coupon belongs to the owner of the bond from which it has been detached. And in case that any one other than said trustees shall purchase, said purchaser shall at once pay to said commissioner the amount of his bid in such bonds or coupons at their ascertained *pro rata* value, or in cash, as hereinafter provided. And in case any such purchaser shall fail to make such payment immediately upon the acceptance of his bid, such failure shall be deemed a withdrawal of his bid, and said master shall forthwith and without further notice again offer said property for sale, under the provisions of this decree. And upon such bid being paid, said commissioner shall execute a deed conveying said property to the purchaser, but no deed executed by him shall be delivered to the grantee until such sale shall have been reported and confirmed by this court.

And it is further ordered and decreed that in case said prop-
90 erty shall be purchased by any company or combination of railway bondholders otherwise than through the trustees, that any other bondholder shall, at his election, to be expressed in writing, filed with the clerk of this court within sixty days after the sale, be entitled either to take his share of the fund in court, or his proportional share of any new company which may be formed by the purchasers. But any bondholder electing to take the latter shall thereby waive his right to any part of the fund in court, and shall, before being entitled to receive any portion of the stock or securities of said new company, pay to such new company his full proportionate share of the costs of this suit and sale, and of the organization of such company, with interest. And if any bondholder shall fail to express his election, by writing, as aforesaid, he shall be deemed to have elected to take his share of the fund in the court, and to have waived his right to take any part in such new company.

And it appearing that the trustees who hold the bonds of the State of Arkansas which have been received by them in exchange for bonds of the Railway Company have filed said bonds with the master of this court, it is ordered that they be held and disposed (of) by the court as, upon the consideration of the rights and equities of all persons interested therein, may be found just and equitable.

And it is further ordered that the master of this court do ascertain and state the amount required in any case to be paid in cash by the purchaser, and that he report the same within ten days before the time of sale. And it being necessary that the operation of said road should be continued, it is ordered that said receiver do continue to operate the same, with the same powers heretofore conferred upon him, until the further order of this court.

And it is further ordered that Alfred Sully, Esq., be, and he is, appointed a commissioner for the purpose of making said sales and carrying this decree into effect; and that this cause be reserved for further directions. * * *

91 And whereas I, Alfred Sully, the commissioner appointed by said decree to make sale of the said property, charter, and

franchises therein described, did fix and appoint the twenty-seventh day of April, A. D. 1877, as the day of sale thereof, and did give two months' notice thereof, by advertisements printed in the Arkansas Gazette, a newspaper published in the city of Little Rock, in the State of Arkansas; in the Memphis Daily Appeal, a newspaper published in the city of Memphis, in the State of Tennessee; and in the Evening Post, a newspaper published in the city of New York, in the State of New York—a true copy of which advertisement was made part of my report to said court, hereinafter copied.

And whereas I did, on said day, at 12 o'clock m., attend at the door of the building in which said court is held, at the corner of Fourth and Main streets, in the city of Little Rock, in the State of Arkansas, and neither the said Memphis and Little Rock Railroad Company nor the said Memphis and Little Rock Railway Company having paid the sums by said decree found due from and ordered to be paid by them, I did, at said time and place, having publicly read said notice aloud, in the presence and hearing of all persons there present, offer for sale, all and singular, the property, charter, and franchises, in the lots and order and upon the terms in said decree prescribed; at which time and place William S. Pierson, Watson Matthews, and R. K. Dow, as trustees for all the holders of bonds secured by the first mortgage deed of the Memphis and Little Rock Railway Company, bid and offered for the same, and for each lot thereof, the sum specified and mentioned in my report to said court, hereinafter copied and made part of this deed; and they being the highest and best bidders for each and all of said lots, the same were knocked off to them, and they, as such trustees, declared by me to be the purchasers of all and singular the property, charter, and franchises, rights and privileges in said decree mentioned and described, and of each and every lot and parcel thereof.

92 And whereas afterward, on the twenty-eighth day of April, A. D. 1877, I did make and file in said court a report in writing of said sales, and of my acts and doings as such commissioner; and whereas on said day, upon consideration of said report, it was by the said court decreed as follows, to wit:

WILLIAM S. PIERSON, WATSON MATTHEWS, R. K. DOW, ROBERT C. BRINKLEY, and SAM. TATE

v.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, MEMPHIS AND Little Rock Railway Company, Henry F. Vail, Edward B. Wesley, Jeptha H. Wade, and William M. Farrington.

On this day came the complainants, by Rose and B. C. Brown, their counsel, and the defendants, by Gallagher and S. R. Cockrill, their counsel, and also came Alfred Sully, Esq., the commissioner appointed by the decree of this court in this cause, rendered on the twenty-first day of November, A. D. 1876, to sell the property, charter, and franchises in said decree mentioned, and files in court here his report of the sale of said property, charter, and franchises, made by virtue of said decree, which report is in the words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Arkansas.

WILLIAM S. PIERSON, WATSON MATTHEWS, R. K. DOW, ROBERT C. BRINKLEY, and SAM. TATE, Complainants,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, THE MEMPHIS and Little Rock Railway Company, Henry F. Vail, Edward B. Wesley, Jeptha H. Wade, and William M. Farrington, Defendants.

To the Hon. Henry C. Caldwell, judge of the said circuit court in chancery sitting:

Alfred Sully, who by the decree of this court in the above-
93 entitled cause, rendered on the twenty-first day of November, 1876, was appointed the commissioner of this court to sell the charter, franchises, and other property in said decree mentioned and described, respectfully reports that, having fixed upon and appointed the twenty-seventh day of April, 1877, as the day whereon the said sale should be made, he gave two months' notice that he would make such sale, at the place named in the decree, on that day, by advertisements printed in the Arkansas Gazette, a newspaper published in Little Rock, Arkansas; the Memphis Daily Appeal, a newspaper published in the city of Memphis, Tennessee; and the Evening Post, a newspaper published in the city of New York; which advertisements were in the words and figures following, to wit:

Sale.—Memphis and Little Rock Railroad.

In accordance with a final decree rendered by the United States circuit court for the eastern district of Arkansas, in a case therein depending, in which William S. Pierson *et al.* are plaintiffs and the Memphis and Little Rock Railroad Company *et al.* are defendants, I shall proceed to sell, between the hours of ten o'clock a. m. and four o'clock p. m., on the twenty-seventh day of April, 1877, for cash in hand to the highest bidder, at the front door of the building in which said court is held, on the corner of Main and Fourth streets, in the city of Little Rock, State of Arkansas, all the lands granted to the Memphis and Little Rock Railroad Company by the State of Arkansas, by the act of the Legislature of said State, approved January 19, 1855, and by the act of Congress, approved February 9, 1853, which had not been sold by said company at the date of said decree, and also the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite Memphis, to said city of Little Rock, its road-bed, depots, right of way, and all its works and rolling stock, and the charter and franchises
of said railroad company. The lands first above described
94 will first be sold in one lot, and then the remainder of the property above described which belonged to said Memphis and Little Rock Railroad Company on the first day of May, 1860, will be sold in one lot. Bidders at said sale will be required to deposit with the commissioner, before bidding, a sufficient sum of

money to pay the debts due from the receiver in chancery of said property in said cause, as reported under said decree, or else to deposit with him a majority in value of the bonds and coupons secured by the mortgage of the Memphis and Little Rock Railroad Company, dated May 1, 1860, which deposit shall be forfeited if the purchaser making such deposit shall fail to comply with the terms of his purchase. Payment of the purchase-money shall be made within ten days after the day of sale. Overdue coupons and bonds secured by said mortgage are receivable in payment of purchase-money for the distributive share of the purchase-money to which they shall be entitled. These sales are made subject to the debts created or assumed by said receiver, except debts for money borrowed under the order of said court, and subject to all suits pending against him at the time of said sale, for payment of which liabilities a lien is reserved on said property. Immediately after said sale I shall proceed to sell for cash, at the same place, in one lot, all the property of the Memphis and Little (Rock) Railway Company, embraced in its mortgage dated December 1, 1873, comprising all the right, title, and interest of said railroad company in the property above named, and the charter and franchises of said railway company, and all its personal property and choses in action, its rolling-stock and connections with other railroads, and all its property and appurtenances of every kind, including railroad depots and rights of way in Memphis, Tennessee, as more fully and particularly set out in said decree. The bonds and overdue coupons secured by said last named mortgage will be received in payment of the purchase-money for the distributive shares of such purchase-money that shall be payably on the same. Copies of said final decree may
95 be obtained by addressing Ralph L. Goodrich, Esq., clerk of said court, Little Rock, Arkansas, with fees for transcribing the same:

Given under my hand at the city of Little Rock, this twenty-fourth day of February, 1877.

ALFRED SULLY, *Commissioner.*

U. M. ROSE AND B. C. BROWN,
Plaintiffs' Solicitors.

That upon the day named he attended at the said place, at 12 o'clock m., and neither of the sums required by the decree to be paid by said defendants having been paid, he offered for sale to the highest bidder in one lot all the lands granted to the Memphis and Little Rock Railroad Company by the State of Arkansas by the act of the Legislature of said State, approved January 19, 1855, and by the act of Congress, approved February 9, 1853, which had not been sold by said company at the date of said decree, amounting in the aggregate to $93,469\frac{35}{100}$ acres, of which, also, he at the same time publicly exhibited a schedule containing a list of the sectional and township numbers of said land; that, at said sale, William S. Pierson, Watson Matthews, and R. K. Dow as trustees for the holders of the bonds secured by the mortgage of the Memphis and Little Rock Railway Company, bid and offered to pay for the said lands the

sum of twenty-five thousand dollars, which being the best bid which could be obtained therefor, the said lands were struck off to said trustees, and they declared to be the purchasers thereof.

Your commissioner then, at the same place and on the same day, offered for sale the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite the city of Memphis in the State of Tennessee, to the city of Little Rock in the State of Arkansas, its road-bed, right of way, and all its work and rolling-stock which belonged to said company on the first day of May, 1860, together with the charter by which said com-
96 pany was incorporated and under which it was organized, and all the rights, privileges, and franchises thereof, for which said William S. Pierson, Watson Matthews, and R. K. Dow, as such trustees, bid and offered to pay the sum of one hundred thousand dollars; and this being the best bid which could be obtained therefor, your commissioner struck off the said last-named property or lot to them, and declared them, as such trustees, to be the purchasers thereof.

And your commissioner reports that the said trustees complied with all the requirements of sale, and have paid their said bid by paying the sum required by said decree to be paid in cash, and by transferring to the master of this court an amount of the overdue coupons upon the bonds of said railroad company, issued under said mortgage—heretofore deposited with said master by order of the court—equal in amount to the residue of said bid. Your commissioner further reports that at the same place, and on the same day, he offered for sale, in one lot, all the property conveyed by the Memphis and Little Rock Railway Company to the New York Guaranty and Indemnity Company, by its first mortgage deed, to wit, all the right, title, and interest of the said railway company in and to the following-described property, to wit: All and singular the railroad aforesaid and rights of way from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden and State of Arkansas, to Little Rock, in the county of Pulaski and State of Arkansas, with the connections of said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad, and any railroad depots and rights of way in the city of Memphis, State of Tennessee, belonging to said railway company, and all rails, trestles, ties, tracks, side-tracks, switches, bridges, depots, stations, buildings, water-tanks, machine shops, car-houses, engine-houses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments that said railway company then owned, or might thereafter acquire
97 or become entitled to in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of accounts, records, muniments, and evidences of title, and choses in action which were then owned or might thereafter be acquired by said railway company; and also all the charters, franchises, privileges, and immunities, including the right of franchise to be a corporation,

which said railway company then owned or possessed, or might thereafter own or acquire in the States of Arkansas or Tennessee, or elsewhere; and also all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had or received or derived by the said railway company from its railroad or other property, or in any other way whatever; at which said sale Wm. S. Pierson, Watson Matthews, and R. K. Dow, as trustees of said deed and of the holders of the bonds secured thereby, bid and offered to pay therefor the sum of one hundred and fifty thousand dollars, which bid being the highest and best which could be obtained therefor, your commissioner struck off the last-named lot of property to said trustees, and declared them the purchasers thereof.

Your commissioner further reports that said trustees have in all things complied with the conditions and requirements of said decree, and that the sale was open, fair, and public, and was made within the hours of said day prescribed by the said decree.

And having fully reported, etc.

ALFRED SULLY,
Commissioner.

UNITED STATES OF AMERICA, *Eastern District of Arkansas:*

Alfred Sully, being duly sworn, says: That the facts stated in the foregoing report are true, in substance and in fact.

ALFRED SULLY.

Subscribed and sworn to before me, this twenty-seventh day of April, A. D. 1877.

FRANK STRONG,
Notary Public.

98 And there being no exceptions filed or taken to said report, and it appearing that the said sales were made in strict conformity with the terms and directions of the said former decree of this court, and that they were fair, open, and public, upon due consideration, it is by the court ordered and decreed that the said sales, and each of them, be, and the same are hereby, in all things confirmed and made valid and effectual, and said commissioner is ordered and directed to make, execute, and deliver to said purchasers a deed conveying all the said property, charter, and franchises to them, the said William S. Pierson, Watson Matthews, and R. K. Dow, in trust for all the holders of bonds secured by the mortgage of the Memphis and Little Rock Railway Company. And it is further ordered that the sum of one thousand dollars be allowed said commissioner for his services, to be paid out of the fund in court.

Now, therefore, I, Alfred Sully, as commissioner of the said circuit court of the United States, by virtue of the afore-recited decrees of said court in the cause aforesaid, hereby executing the power conferred upon me by said court, in consideration of the premises and of the sums so paid by the said William S. Pierson, Watson Matthews and R. K. Dow, as trustees as aforesaid, have granted, bargained and sold, and by these presents do grant, bargain, and sell, and convey

unto them, the said William S. Pierson, Watson Matthews, and R. K. Dow, all and singular all the lands granted to the Memphis and Little Rock Railroad Company by the act of the General Assembly of the State of Arkansas approved January 19, 1855, and by the act of the Congress of the United States approved February 9, 1853, which had not been sold by said railroad company on the twenty-first day of November, 1876; also the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite to the city of Memphis, in the State of Tennessee, to Little Rock, in the State of Arkansas, its road-bed, right of way, and all works and rolling-stock
99 of or belonging to said company, together with the charter by which said company was incorporated and under which it was organized, and all the rights, privileges, and immunities thereof; and also all the right, title, and interest of the Memphis and Little Rock Railway Company in and to the railroad aforesaid, and rights of way from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden and State of Arkansas, with the connections of said railroad with the Cairo and Fulton railroad and the Little Rock and Fort Smith railroad; also all railroad depots, tracks, trestles, inclines, leases, rights of way, and easements in the city of Memphis, and State of Tennessee, belonging to said railway company; and all rails, trestles, ties, tracks, side tracks, switches, bridges, depots, stations, buildings, water tanks, machine shops, car houses, engine houses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments which said railway owned on the first day of December, A. D. 1873, or acquired afterwards, either in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; also, all and singular, all lands, real estate, property of every kind, real, personal, or mixed, books of account, records, muniments and evidences of title and choses in action, which were owned by said railway company on the first day of December, A. D. 1873, or were acquired by it after that date; and also all the charters, franchises, privileges, and immunities, including the right of franchise to be a corporation, which said railway company owned or possessed on that day or thereafter acquired, in the States of Arkansas or Tennessee, or elsewhere; and also all the incomes, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by said railway company from its railroad, or other property, or in any way whatever, after the said first day of December, A. D. 1873; to have
and to hold the said above described, granted, and conveyed
100 property, charter, rights, franchises, privileges, and immunities to them, the said William S. Pierson, Watson Matthews, and R. K. Dow, in trust for all the holders of the bonds secured by the first mortgage deed executed by said Memphis and Little Rock Railway Company, and upon the further trust that they will convey the same and all thereof to such company or corporation as may be formed by the holders of a majority of such bonds, at such time and upon such terms and conditions as a majority of the holders of such bonds may require.

In testimony whereof, I hereto subscribe my name as such commissioner, and affix my seal at Little Rock, Arkansas, this twenty-eighth day of April, A. D. 1877.

[SEAL.] ALFRED SULLY,
Commissioner.

UNITED STATES OF AMERICA, } ss:
Eastern District of Arkansas, County of Pulaski, }

Be it remembered that on this day before me, a notary public in and for the county of Pulaski, in the State of Arkansas, personally came the above and within-named Alfred Sully, to me well known as the party grantor to the foregoing deed of conveyance, and acknowledged that he had, as commissioner, as aforesaid, executed the same for the considerations and purposes therein contained and set forth.

Witness my hand and official seal, at the city of Little Rock, this twenty-eighth day of April, A. D. 1877.

[SEAL.] FRANK STRONG,
Notary Public.

101 EXHIBIT L WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Articles of Organization.

Whereas the Memphis and Little Rock Railroad Company was, by its act of incorporation, authorized to borrow money on the credit of the company, and on a mortgage of its charter and works; and

Whereas said company executed such power, and by its mortgage deed of date May 1, 1860, conveyed its charter and works to George C. Watkins, R. C. Brinkley, and Sam. Tate, trustees, to secure payment of its certain bonds in such mortgage mentioned, and of the interest thereon, as the same became due and payable; and

Whereas afterward, George C. Watkins having died, the said Brinkley and Tate resigned, and R. C. Brinkley, Sam. Tate, and William S. Pierson were duly appointed trustees thereof in their stead; and

Whereas said company did make default in payment of installments of interest upon said bonds, by means whereof, and by the terms and conditions of said mortgage deed, it became and was forfeit; and

Whereas said company, to secure other bonds, by its mortgage deed, dated the first day of March, 1871, conveyed its franchises and all its other property of every character and description to Henry F Vail; and

Whereas the said last-named mortgage deed, by reason of the default of said company, became and was forfeit, and the said Henry F. Vail, upon due and legal request and notice, sold the property so to him conveyed on the seventeenth day of March, 1873, at
102 which sale one Stillman Witt, for himself and his associates, became the purchaser thereof; and

Whereas said Stillman Witt and his associates, with other persons,

organized themselves into a corporation by the name of the Memphis and Little Rock Railroad Company, and the said Stillman Witt and his associates, by their deed, of date November 17, 1873, conveyed all the franchises and privileges by them acquired by their purchase to said Memphis and Little Rock Railway Company; and

Whereas said railway company, by its first mortgage deed, of date December 1, 1874, conveyed all the franchises and property so acquired to the New York Guaranty and Indemnity Company, to secure the payment of its certain bonds in said deed mentioned, and of the interest thereon as it became payable, by which deed it was provided that the said New York Guaranty and Indemnity Company might resign its trust, and that the same should thereby devolve upon William S. Pierson, R. K. Dow, and Watson Matthews, and by which said deed it was also further provided that in event of a sale under and by virtue of said deed, judicial or otherwise, said trustees, upon the request of the holders of a majority of the bonds secured by said last-named deed, should purchase the property therein mentioned, and that thereupon no bondholder should be entitled to anything except his *pro rata* share in a new company to be formed by the majority of such bondholders; and

Whereas said Guaranty and Indemnity Company did afterwards resign, and the trusts of said deed devolved upon William S. Pierson, R. K. Dow, and Watson Matthews, who accepted the same, and are the trustees thereof; and

Whereas said railway company did make default in the payment of interest due on its said bonds, by which its said deed became and was forfeit; and

103 Whereas, in a certain cause lately depending in the circuit court of the United States for the eastern district of Arkansas, wherein William S. Pierson, Watson Matthews, R. K. Dow, Robert C. Brinkley, and Sam. Tate were complainants, and the Memphis and Little Rock Railroad Company, the Memphis and Little Rock Railway Company, Henry F. Vail, Jeptha H. Wade, Edward B. Wesley, and William F. Farrington were defendants, it was by said court, on the twenty-first day of November, 1876, decreed that unless the Memphis and Little Rock Railroad Company and the Memphis Little Rock Railway Company pay certain sums in said decree mentioned the equity of redemption of the defendants in and to the property, charter, rights and immunities in said two deeds conveyed and described be foreclosed and forever barred, and that said property, charter, rights, immunities and privileges be sold at public auction by Alfred Sully, who was appointed the commissioner of said court to make such sale; and

Whereas, such sums not being paid, and due notice sale having been given by the commissioner appointed by said court to make sale of said properties, a majority of the holders of the bonds secured by said mortgage deed of the railway company did in writing duly request the trustees thereof to buy in the said charter, lands and other property conveyed as aforesaid, by said railroad company, as well as the franchises and property conveyed by the said railway company; and

Whereas said trustees did make such purchase, and the sale thereof having been reported to and in all things confirmed by said court, the commissioner of sale did by deed convey the same, and each and all thereof to said trustees, who now stand ready to convey to the Memphis and Little Rock Railroad Company, when reorganized by a majority of the holders of the bonds secured by said railway mortgage:

Now, therefore, we, the undersigned, being the holders of a
104 majority of the bonds secured by the mortgage of the Memphis and Little Rock Railway Company, under and by virtue of the provisions of the act of the General Assembly of the State of Arkansas, approved January 11, 1853, entitled "An act to incorporate the Memphis and Little Rock Plank or Railroad Company," and an act of the General Assembly of said State, approved January 19, 1855, entitled "An act to aid in the construction of the eastern branch of the Cairo and Fulton railroad, and to adopt the Memphis and Little Rock railroad survey as said eastern branch," and of all other act specially amendatory of said first-named act which were accepted by the president and directors of said former Memphis and Little Rock Railroad Company, and do hereby reorganize the said Memphis and Little Rock Railroad Company, and do declare and make known that the stock of said Memphis and Little Rock Railroad Company, as reorganized, is fixed at thirteen hundred thousand dollars, divided into thirteen thousand shares of one hundred dollars each, and that said shares of stock are held and owned as follows:

R. L. Crook	64 shares
Thomas Branch & Co.	123 "
Edward Matthews, J. P. Thorndike,	3,340 "
F. H. Cossit	1,455 "
S. M. Swenson	735 "
William S. Pierson	110 "
Henry Whitin	70 "
A. B. Wood	75 "
C. B. Collins	62 "
A. W. Spies	198 "
Charles Pfizer & Co.	130 "
E. M. Pease	173 "
S. M. Swenson, attorney	181 "
B. M. Price	101 "
G. W. Hubbard	12 "
F. E. Mather	6 "
A. B. Marks	85 "
105 H. K. Sheldon	145 "
V. Winters & Son	12 "
G. W. Harshman	12 "
John L. Farwell	41 "
W. S. Pierce	25 "
T. W. Shannon, tr.	31 "
J. C. Knox	6 "

	G. D. L'Huilier, tr.	10 shares
	E. C. Boynton	30 "
	R. L. Cutting, Jr., & Co.	68 "
	Amos Morrill	117 "
	D. J. Kerr	5 "
	David Stewart	25 "
	J. S. Grinnan	46 "
	B. G. Duval	65 "
	William T. Otto, ex'r	50 "
	Julia Laquerenne	12 "
	E. J. Jaques	87 "
	J. A. Bell	62 "
	P. C. Bethell	435 "
	Charles Barlow	12 "
	H. A. Stiles, ex'r	37 "
	H. A. Stiles	6 "
	H. L. King	30 "
	C. M. Lampson & Co.	1,225 "
	James Tinker	10 "
	C. W. Chandler, ex'r of George Peabody	795 "
	Isaac N. Phelps	117 "
	F. Randall	12 "
	P. Dow	230 "
	James M. Mill	77 "
	John Stanton, Jr.	5 "
	A. C. Brownell	105 "
	J. W. Brownell	62 "
	M. Baird	195 "
	Henry Birkner	17 "
	Israel Corse	18 "
106	David Dows	45 "
	Burnham, Parry, Williams & Co.	380 "
	Augusta B. Matthews	125 "
	M. B. Prichard	5 "
	J. W. Wynne	5 "
	B. C. Brown	5 "
	William Black	5 "
	James Harrington	5 "
	William S. Pierson and R. K. Dow, tr's	1,196 "
	J. M. Wallace	25 "
	R. K. Dow	47 "
		13,000 shares.

Second. We do further declare that each and every share of the afore-named stock is fully paid stock, and on behalf of said railroad company do acknowledge that one hundred dollars has been paid by the holder of each share upon and for the same.

Third. That for the purpose of distinction, and to avoid confusion and mistakes, the words "as reorganized" shall be written or printed

immediately after the name of the company in all contracts, deeds, or writing made by or to the company.

Fourth. That we hereby require the said trustees, William S. Pierson, Watson Matthews, and R. K. Dow, to convey all and singular the property, charter, franchises, rights, privileges, and immunities so conveyed to them by such commissioner to the Memphis and Little Rock Railroad Company, as reorganized, upon the following terms and conditions, to wit:

First. That said railroad company, as reorganized, shall issue its two hundred and fifty bonds, payable to bearer at the office of the Central Trust Company of New York, in the city of New York, each for one thousand dollars, maturing in five equal installments on the first days of May in the years 1879, 1880, 1881, 1882, and 1883, bearing interest from date at the rate of ten per centum per
107 annum, payable semi-annually at the same place, with coupons for such interest annexed, and shall secure the payment of the principal and interest thereof by a mortgage of all and singular the said property, charter, franchises, rights, privileges, and immunities, of which mortgage said Pierson, Matthews, and Dow shall be trustees, and shall deliver the same to the said Pierson, Matthews, and Dow, to be by them sold, and the proceeds applied to the payment of the liens upon the said property, reserved by the decree of ths said court directing the sale thereof, and to the payment of moneys borrowed by them to make the cash payment required by said decree.

Second. That said Memphis and Little Rock Railroad Company, as reorganized, shall execute and deliver to said Pierson, Matthews, and Dow its two thousand five hundred and seventy-five other bonds, each for the sum of one thousand dollars, and its one hundred other bonds, each for two hundred and fifty dollars, payable at the same place thirty years after date, bearing interest from the first day of July, 1878, and until the first day of July, 1882, at the rate of four per centum per annum, and after the last-named date at eight per centum per annum, payable at the same place, with coupons for such interest attached, and shall make provision for a sinking fund for redemption of such bonds, and shall secure payment of said bonds, interest, and sinking fund by a mortgage of all said property, charter, franchises, rights, privileges, and immunities, of which mortgage said Pierson, Matthews, and Dow shall be trustees; such last-named bonds to be by said Pierson, Matthews, and Dow equally distributed among the holders of the bonds secured by the mortgage of the Memphis and Little Rock Railroad Company of date December 1, 1873.

Third. That said Memphis and Little Rock Railroad Company, as reorganized, shall assume the defense of all suits pending or which may be brought by any one against R. K. Dow, as receiver of the said railway, and shall pay and discharge any judgment
108 which may be rendered against such receiver in any such action, and shall also forever protect and hold harmless the said William S. Pierson, Watson Matthews, and R. K. Dow, and each of them, from all costs, charges, damages, claims, demands, and actions

arising out of or brought against them, or either of them, of or concerning any of their acts or doings, as trustees of the first mortgage of the Memphis and Little Rock Railway Company, and shall pay all costs, damages, charges, or expenses which said Pierson, Matthews, and Dow, or either of them, may sustain or be put to in consequence of their accepting the trusts, or either of the trusts, of the mortgages specified in the two preceding conditions.

Fifth. The first meeting of the stockholders of said company shall be held at the office now occupied by R. K. Dow, receiver, on the thirtieth day of April, A. D. 1877, at ten o'clock a. m.

In witness whereof, we hereunto subscribe our names, this twenty-eighth day of April, 1877.

R. L. Cook,
Thomas Branch & Co.,
Edward Matthews,
J. P. Thorndike,
F. H. Cossitt,
S. M. Swenson,
Henry Whitin,
A. B. Wood,
Charles B. Collins,
A. W. Spies,
Charles Pfizer & Co.,
E. M. Pease,
S. M. Swenson (attorney),
Amos Morrill,
D. J. Kerr,
David Stewart,
J. S. Grinnan,
B. G. Duval,
William T. Otto (executor),
Julia Laquerenne,
E. J. Jaques,
J. A. Bell,
B. M. Price,
G. W. Hubbard,
H. A. Stiles,
C. M. Lampson & Co.,
C. W. Chandler (executor),
Francis Randall,
J. M. Wallace,
R. K. Dow,
F. E. Mather,
A. B. Marks,
H. K. Sheldon,
V. Winters & Son,
G. W. Harshman,
John L. Farwell,
W. S. Pierce,
T. W. Shannon (tr.),
J. C. Knox,

G. D. Huiler (tr.),
E. C. Boynton,
R. L. Cutting, Jr., & Co.,
James M. Mills,
John Stanton, Jr.,
A. C. Brownell,
S. W. Brownell,
M. Baird,
Henry Birkner,
Israel Corse,
David Dows,
Burnham, Parry, Williams & Co.,
P. C. Bethell,
Charles Barlow,
H. A. Stiles (executor),
H. L. King,
James Tinker,
Isaac N. Phelps,
P. Dow,
Augusta B. Matthews,
By R. K. Dow, *Their Attorney.*

109 EXHIBIT M WITH ANSWER.

R. K. Dow *et als.*, Trustees, *v.* M. & L. R. R. Co.

Deed of Trustees to Memphis and Little Rock Railroad Company.

This indenture, made and executed this thirtieth day of April, A. D. 1877, by and between William S. Pierson, Watson Matthews, and R. K. Dow, parties of the first part hereto, and the Memphis and Little Rock Railroad Company, as reorganized, party of the second part hereto, witnesseth:

That whereas Alfred Sully, as commissioner of the circuit court of the United States for the eastern district of Arkansas, by his deed of date the twenty-eighth day of April, 1877, did convey all and singular the property, charter, franchises, rights, privileges and immunities hereinafter described to the parties of the first part in trust for all the holders of bonds secured by the first mortgage deed executed by the Memphis and Little Rock Railway Company on the first day of December, 1873, and upon the further trust, that they, the parties of the first part, would convey the same to such company or corporation as might be formed by a majority of such bondholders at such time and upon such terms and conditions as a majority of such bondholders might require; and whereas a majority of such bondholders have reorganized the Memphis and Little Rock Railroad Company;

And whereas a majority of said bondholders have and do require the said parties of the first part to convey the said property, charter, franchises, rights, privileges, and immunities to the said
110 Memphis and Little Rock Railroad Company, as reorganized, upon the terms and conditions following, to wit:

First. That the said company shall execute and deliver to the parties of the first part its two hundred and fifty bonds, each for the sum of one thousand dollars, maturing in five equal annual installments on the first days of May, in the years 1879, 1880, 1881, 1882, and 1883; such bonds to bear interest at the rate of ten per centum per annum from date, payable semi-annually on presentation of the interest coupons thereto attached, interest and principal payable in the city of New York, and shall secure the payment of the principal and interest of such bonds by mortgage of all and singular said property, charter, franchises, rights, privileges, and immunities, of which mortgage the parties of the first part shall be trustees; such bonds to be sold by the parties of the first part and the proceeds applied to the payment of the liens upon the said property, expressed and reserved in the decree of said court ordering and directing the sale thereof, and to repay moneys borrowed by said parties of the first part to make the cash payment required by such decree.

Second. That said railroad company, as reorganized, shall execute and deliver to said parties of the first part its twenty-five hundred and seventy-five other bonds, each for the sum of one thousand dollars, and its one hundred other bonds, each for the sum of two hundred and fifty dollars, payable thirty years after the date thereof, in the city of New York, to bear interest after the first day of July, 1878, and until the first of July, 1882, at the rate of four per centum per annum, and after said last named date, at the rate of eight per centum per annum, such interest to be payable semi-annually on presentation and surrender of the interest coupons to such bonds annexed, shall make provisions for a sinking fund of $10,000 a year,

111 to be applied to the redemption of such bonds, and shall secure payment of the principal and interest of such bonds and of such sinking fund, by a mortgage of all and singular said property, charter, franchises, rights, privileges, and immunities of which mortgage the parties of the first part shall be trustees; such last named bonds to be distributed by the parties of the first part equally among the holders of bonds secured by the mortgage executed by the Memphis and Little Rock Railway Company, on the first day of December, A. D. 1873.

Third. That said Memphis and Little Rock Railroad Company, as reorganized, shall assume the defense of the suits pending or which may be brought by any one against R. K. Dow, as receiver of the property hereinafter mentioned, and shall pay and discharge any judgment which may be rendered against such receiver in any such action, and shall also forever protect and hold harmless the said parties of the first part, and each of them, from all costs, charges, damages, claims, demands, and actions arising out of or brought against them, or either of them, of or concerning any of their acts and doings as trustees of the first mortgage of the Memphis and Little Rock Railway Company, and shall pay all costs, damages, charges, or expenses which said parties of the first part, or either of them, may sustain or be put to in consequence of their accepting the trusts, or either of the trusts, of the mortgages specified in the two preceding paragraphs hereof.

And whereas the said Memphis and Little Rock Railroad Company, as reorganized, by a resolution of its stockholders, on this day in convention assembled, has agreed and consented to such conditions, and has authorized and directed the execution and delivery of such bonds to the parties of the first part, and the execution of such mortgages to secure payment of the same:

Now, therefore, we, the parties of the first part, in consideration of the aforementioned bonds and obligations of the said party of the second part, secured by the mortgages aforesaid, do by these
112 presents grant, bargain, sell, and convey unto the said party of the second part all and singular the lands granted to the Memphis and Little Rock Railroad Company by the act of General Assembly of the State of Arkansas, approved January 19, 1855, and by the act of the Congress of the United States, approved February 9, 1853, which had not been sold by said railroad company on the twenty-first day of November, 1876; also the Memphis and Little Rock railroad, extending from the west bank of the Mississippi river, opposite the city of Memphis, in the State of Tennessee, to the city of Little Rock, in the State of Arkansas, its road-bed, right of way, and all works and rolling-stock of or belonging to said company, together with the charter by which said company was incorporated, and under which it was organized, and all the rights, privileges, and immunities thereof; and also all the right, title, and interest of the Memphis and Little Rock Railway Company in and to the railroad aforesaid and rights of way from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden, and State of Arkansas, to Little Rock, in the county of Pulaski, and State of Arkansas, with the connections of said railroad with the Cairo and Fulton railroad, and the Little Rock and Fort Smith railroad; also all railroad depots, tracks, trestles, inclines, leases, rights of way, and easements in the city of Memphis, in the State of Tennessee, belonging to said railway company, and all rails, trestles, ties, tracks, side-tracks, switches, bridges, depots, stations, buildings, water-tanks, machine-shops, car-houses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments which said railway owned on the first day of December, A. D. 1873, or acquired afterward, either in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; also all and singular all lands, real estate, property of all kinds, real, personal, or mixed, books of account, records,
113 muniments, and evidences of title and choses in actions which were owned by said railway company on the first day of December, A. D. 1873, or were acquired after that date, and also all the charters, franchises, privileges, and immunities, including the right of franchise to be a corporation, which said railway company owned or possessed on that day or thereafter acquired in the States of Arkansas or Tennessee or elsewhere, and also all the incomes, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by said railway company from its railroad or other property or in any way whatever after the said first day of

December, A. D. 1873; to have and to hold unto the said party of the second part and to its successors and assigns forever; but neither of the parties of the first part makes or assumes any covenant of warranty of title, express or implied, to any of the above-described property, but they sell and convey as trustees only and not otherwise.

In testimony whereof the parties of the first part hereto subscribe their names and affix their seals this the day and year first above written.

WM. S. PIERSON. [SEAL.]
R. K. DOW. [SEAL.]
WATSON MATTHEWS, [SEAL.]
By R. K. DOW, *His Attorney-in-Fact.*

STATE OF ARKANSAS, *County of Pulaski:*

Be it remembered that on this twentieth day of April, 1877, before me, Frank Strong, an acting and duly commissioned notary public for the county and State aforesaid, came and appeared William S. Pierson, R. K. Dow, — his attorney-in-fact, to me personally well known to be the persons whose names appear to the foregoing deed as parties grantor, and each severally stated and acknowledged that he had executed the same for the consideration and purposes therein mentioned and set forth.

114 In testimony whereof I hereto sign my name as such notary public and affix my notarial seal, this the day and year aforesaid.

FRANK STRONG,
Notary Public.

Power of Attorney.

Whereas William S. Pierson, R. K. Dow, and myself, trustees, executing the trusts specified in the first mortgage deed of the Memphis and Little Rock Railway Company, have been requested by a majority of the holders of the bonds secured by said deed to buy in the franchises, rights, privileges, and property in said deed conveyed and the charters of the Memphis and Little Rock Railroad Company, its franchises, privileges, immunities, rights, and property described and conveyed in the first mortgage deed of said railroad company at the sale of said property, which is to be made under and by virtue of a decree of the circuit court of the United States for the eastern district of Arkansas, on the twenty-seventh day of April, A. D. 1877, for the benefit of all holders of bonds secured by said first-named deed; and whereas should said trustees become the purchaser of the said charter, franchises, and property it is the intention of the said bondholders to form and organize themselves into a company or corporation to own and operate the same under the name of the Memphis and Little Rock Railroad Company, as reorganized; and whereas it will be the duty of myself and my co-trustees, by proper deeds, to convey the property so purchased by us to such company; and whereas I am unable personally to attend

said sale or to be present at the city of Little Rock, Arkansas, where such proceedings are to be had:

Now, therefore, I, Watson Matthews, have made and appointed, and by these presents do make, constitute, and appoint, R. K. Dow, Esq., my true and lawful attorney in fact for me, and in my name to make, execute, and deliver all proper and necessary deeds,
115 conveyances, or other assurances of title conveying the purchased charters, franchises, and property to the company so formed or to be formed by said bondholders, and to make, execute, and deliver all other property and necessary receipts, acquittances, deeds, or other writings which may be found necessary to be executed to complete and carry out the reorganization of said company, and to effect the purposes of the said bondholders, or for the settlement or adjustment of the trusts in us reposed by the provisions of the afore-mentioned deed of the said railway company, hereby fully ratifying and confirming whatsoever my said attorney may lawfully do for me, or in my name, in and about the premises.

Witness my hand and seal, at New York, this twenty-fifth day of April, A. D. 1877.

(Signed) WATSON MATTHEWS.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On the twenty-fifth day of April, 1877, before me personally came Watson Matthews, to me known to be the person described in and who executed the within instrument, and he acknowledged that he executed the same for the consideration and purposes therein mentioned.

Witness my hand and notarial seal.

(Signed) PIERRE W. WILDEY,
Notary Public, N. Y. Co.

116 EXHIBIT N WITH ANSWER.

R. K. Dow *et al.*, Trustees, *v.* M. & L. R. R. Co.

Preference Ten Per Cent. Mortgage.

This indenture, made and executed this first day of May, A. D. 1877, by and between the Memphis and Little Rock Railroad Company, as reorganized, a corporation duly incorporated and chartered by the act of the General Assembly of the State of Arkansas, approved January 11, 1853, entitled "An act to incorporate the Memphis and Little Rock Plank or Railroad Company," and duly reorganized under said act and charter, and the acts of the said General Assembly specially amendatory thereof, party of the first part, and William S. Pierson, R. K. Dow, and Watson Matthews, parties of the second part; witnesseth, that—

Whereas the party of the first part is desirous to borrow money to pay certain pressing expenses, and is authorized by its said charter to do so upon mortgage of its charter and works; and whereas

the stockholders of the party of the first part, at a general meeting, held at the office of the said company, in the city of Little Rock, Arkansas, on the thirtieth day of April, A. D. 1877, by resolution duly adopted, did authorize the president and directors of said company to borrow two hundred and fifty thousand dollars, to be paid in installments of fifty thousand dollars each, respectively, on the first days of May, in the years 1879, 1880, 1881, 1882, and 1883, with interest from date at ten per centum per annum; to issue bonds of the company therefor, and to secure the payment of the principal and interest of said bonds by a mortgage of all and singular
117 the charter, works, and property of said company; and whereas said company is about to issue, for the purpose and by the authority aforesaid, two hundred and fifty bonds, of even date herewith, each for the sum of one thousand dollars, numbered from 1 to 250, inclusive, bearing interest from date at the rate of ten per centum per annum, payable semi-annually, the first fifty of which mature and become due on the first day of May, 1879; the second fifty of which mature on the first day of May, 1880; the third fifty of which mature on the first day of May, 1881; the fourth fifty of which mature on the first day of May, 1882; and the last fifty of which mature on the first day of May, 1883; which bonds are, with proper changes for maturity, in the following form:

Know all men by these presents, that the Memphis and Little Rock Railroad Company, as reorganized, acknowledges itself indebted, and promises to pay to the bearer hereof, at the office of the Central Trust Company of the State of New York, in the city of New York, on the first day of May, A. D. ——, one thousand dollars, in lawful money of the United States of America, with interest from date at the rate of ten per centum per annum, payable semi-annually, at the place aforesaid, on the first days of May and November of each year, upon presentation and surrender of the interest coupons thereto annexed as they severally fall due. This bond is one of a series of two hundred and fifty bonds of even date, each for one thousand dollars, numbered from 1 to 250, inclusive, of which fifty mature on the first day of May, in the years 1879, 1880, 1881, 1882, and 1883. The payment of all which said bonds and interest is secured by a mortgage or trust deed, bearing even date herewith, by which said company has conveyed all and singular its charter, franchises, privileges, immunities, and property of every character and description to William S. Pierson, R. K. Dow, and Watson Matthews, in trust, to secure the payment of the
118 interest and principal of said bonds as they severally become due. This bond shall pass by delivery, and shall not become obligatory until authenticated by the signatures of two of the said trustees to the certificate on the back hereof.

In witness whereof, the said railroad company, as reorganized, has caused this bond to be signed by its president, and its corporate seal to be hereto affixed, attested by the signature of its secretary, and has caused the interest coupons hereto annexed to be signed by its

treasurer, under and in conformity to said deed, this first day of May, A. D. 1877.

_____ _____,
President of the Memphis and Little Rock Railroad Company, as reorganized.

_____ _____,
Secretary of the Memphis and Little Rock Railroad Company, as reorganized.

We, two of the trustees in the deed mentioned in the foregoing bond, do certify that this bond is one of the series of two hundred and fifty bonds secured by said deed.

_____ _____,
_____ _____,
Trustees.

Now, therefore, in consideration of the premises, and of the sum of one dollar to it paid by the parties of the second part, and to secure and make certain the payment of the several installments of principal and interest of said bonds, as they severally become due and payable, the said party of the first part has bargained and sold, and by these presents does grant, bargain, sell, and convey unto the said parties of the second part, and to the survivor or survivors of them, as joint tenants, and not as tenants in common, all and singu-
119 lar its charter granted by the act of Assembly of the State of Arkansas aforesaid, with all its rights, powers, privileges, immunities, and franchises, and also all and singular its railroad, and rights of way and easements, from the west bank of the Mississippi river, in or near Hopefield, in Crittenden county, Arkansas, to Little Rock, in Pulaski county, Arkansas; the connections of said railroad with the Little Rock and Fort Smith railway, the Saint Louis, Iron Mountain and Southern railroad, its tracks, rails, ties, inclines, trestles, depots, rights of way, leases, easements, and privileges in the city of Memphis, in the State of Tennessee, all rails, trestles, ties, tracks, side-tracks, switches, bridges, depots, stations, buildings, water tanks, machine-shops, car-houses, engine-houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharf-boats, inclines, oil, fuel, supplies, and equipments that the said party of the first part now owns, or may hereafter acquire in the State of Arkansas or Tennessee, or elsewhere, and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, all books of account, records, muniments, and evidences of title, and choses in action, which the party of the first part now owns or may hereafter acquire, wherever situate, and also all the incomes, rents, issues, tolls, profits, receipts, rights, benefits, and advantages had, received, or derived by the party of the first part from any of the hereby conveyed premises, to have and to hold unto the said party of the second part, and to the survivor or survivors of them, as joint tenants, and to their assigns forever; and the party of the first part covenants with the party of the second part, and their assigns, that it is lawfully seized of the above granted property, charter, and fran-

chises, has good right to convey the same in manner and form as it hereby does; that the same is free from incumbrance, and that the title thereto it will warrant and defend against all lawful claims whatsoever.

But this conveyance is made upon the following trusts and conditions, and none other, to wit:

120 First. That so long as the party of the first part shall not make default in the payment of principal or interest of said bonds, it shall retain the possession of all the property hereby conveyed, and receive and enjoy the income thereof, and that until such default the party of the first part shall have the right to sell and convey, free from this trust, any and all of the lands hereby granted, not necessary or convenient to the operating of the said railroad, applying the proceeds thereof to the improvement and betterment of said railroad, its stock and equipments.

Second. Said party of the first part will, from time to time, as incurred, pay all charges, costs, and expenses of the parties of the second part, or either of them, incurred in or about the execution of the trust hereby reposed in them, and will indemnify and hold harmless the parties of the second part against all costs, charges, damages, and expenses which they, or either of them, may sustain, or be put to, in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages as may be incurred by, or arise from, the culpable act or neglect of said parties of the second part.

Third. In case default shall be made by the party of the first part, in the payment of any of the sums specified in the interest coupons annexed to said bonds, or in any of the principal sums specified in said bonds, and shall continue for thirty days after the said sums, or any of them, become due and payable, then and thereupon the said principal sums in all said bonds specified shall immediately become due and payable, and thereupon the parties of the second part, upon the written request of the holders of a majority of said bonds, shall enter upon and take possession of all and singular the charter, franchises, and property hereby conveyed, and shall and may, on a day and at a place in the city of Little Rock, to be by them appointed, sell the same to the highest bidder for cash in hand;

121 first, however, giving thirty days' notice of the time, place, and terms of sale, by advertisement printed in a newspaper published in the city of Little Rock, and in a newspaper published in the city of New York; and the proceeds, after defraying the costs and expenses of this sale, they shall apply to the payment and discharge of all sums of principal and interest then due and unpaid on such bonds, and the residue they shall pay to the party of the first part, or its assigns; and, in case of such sale, the said parties of the second part shall and may convey the property so sold to the purchaser, which deed shall convey all the title of the party of the first part to such property to the grantee therein; and, in case of such sale, the party of the first part hereby expressly waives and relinquishes all right to redeem such sold and conveyed property,

which it may or might have under the laws of the State of Arkansas.

Fourth. In case either of the parties of the second part should die, or resign, or become for any reason unable to execute the trust of this deed, or any of them, then all the trusts of this deed may and shall be executed by the survivors or survivor of them, and if all should die, resign, or become otherwise unable to execute the said trusts, or any of them, the holders of a majority of the said bonds may, by a writing under their hands, appoint another person or persons trustees of this deed, and all the trusts hereof shall and may be executed by the trustees so appointed, as fully as they might or could have been by the parties of the second part, or either of them, and with like effect.

In testimony whereof, the said Memphis and Little Rock Railroad Company, as reorganized, has caused this indenture to be signed by its president, and has caused its corporate seal to be affixed thereto by its secretary, attested by its said secretary, this the first day of May, A. D. 1877.

M. B. PRICHARD,
President of the Memphis and Little Rock Railroad Company, as reorganized.
JOHN W. GOODWIN,
Secretary of the Memphis and Little Rock Railroad Company, as reorganized.

122 STATE OF ARKANSAS, *County of Pulaski:*

Be it remembered that on the first day of May, A. D. 1877, before me, Frank Strong, an acting and duly commissioned notary public within and for the county of Pulaski, in the State of Arkansas, personally appeared M. B. Prichard, to me well known to be the person whose name appears subscribed to the foregoing deed, who, being by me first duly sworn, did make oath and say that he is the president of the Memphis and Little Rock Railroad Company, as reorganized; that the foregoing deed was authorized to be executed by the stockholders of the said company and by the board of directors thereof, and that he signed the same as such president by order of the board of directors; and at the same time also appeared John W. Goodwin, to me well known to be the person whose name appears signed to the foregoing deed, who, being by me first duly sworn, did make oath and say that he is the secretary of the said company and the keeper of the corporate seal thereof; that the seal affixed to the foregoing deed is the seal of the said company; that he affixed it thereto by the order of the board of directors of said company, and that each severally stated that said deed was by said company executed for the considerations and purposes therein mentioned and set forth.

In testimony whereof, I hereto set my hand as such notary public and affix the seal of my office, at the city of Little Rock, in the county of Pulaski aforesaid, this first day of May, 1877.

(Signed) FRANK STRONG,
Notary Public, Pulaski County, Ark.

123 EXHIBIT O WITH ANSWER.

R. K. Dow *et al.*, Trustees, *vs.* M. & L. R. R. Co.

General Mortgage.

This indenture, made and executed this second day of May, 1877, by and between the Memphis and Little Rock Railroad Company, as reorganized, a corporation duly organized under the laws of the State of Arkansas, party of the first part, and William S. Pierson, R. K. Dow, and Watson Matthews, party of the second part, witnesseth: That whereas the charter, franchises, and all other property of every kind, whether real or personal, belonging to the Memphis and Little Rock Railroad Company and to the Memphis and Little Rock Railway Company, as hereinafter more particularly described and set forth, was sold under a decree in chancery rendered by the United States circuit court for the eastern district of Arkansas, in a certain cause therein pending, in which said William S. Pierson and others were plaintiffs, and the said Memphis and Little Rock Railroad Company, the Memphis and Little Rock Railway Company and others were defendants, which decree was rendered on the twenty-first day of November, 1876, said sale under said decree having been made on the twenty-seventh day of April, 1877; and whereas at the said sale the said property was purchased by the said Pierson, Dow, and Matthews in the interest and for the use and benefit of the holders of the bonds issued by the said Memphis and Little Rock Railroad Company and the said Memphis and Little Rock Railway Company, said bonds having been issued for

124 the purpose of raising money for the construction and equipment of the railroad hereinafter described, with an agreement on the part of the said Pierson, Dow, and Matthews, acting as trustees for the said bondholders, that any new company organized for the purpose of operating the said railroad should issue bonds of an equal amount to that represented by the said bonds of the said Memphis and Little Rock Railroad Company and of the said Memphis and Little Rock Railway Company, amounting in all to the sum of two millions six hundred thousand dollars, which bonds of such new company should be used in taking up the said bonds of the Memphis and Little Rock Railroad Company and of the Memphis and Little Rock Railway Company, given for money borrowed for the construction and equipment of the said railroad as aforesaid; and whereas afterwards the said Memphis and Little Rock Railroad Company was duly reorganized under the laws of the State of Arkansas, under the name of the Memphis and Little Rock Railroad Company, as reorganized; and whereas after the said reorganization of the said company it was resolved by the stockholders of the said Memphis and Little Rock Railroad Company, as reorganized, that new bonds for the sum above named should be issued for the purpose of taking up the said bonds of the said Memphis and Little Rock Railroad Company and of the said Memphis and Little Rock Railway Company, in accordance with the said agreement under which the said purchase was made, and should execute a

mortgage on the property hereinafter mentioned for the purpose of securing said bonds, and in form as hereinafter made and declared; and whereas afterwards, by a resolution of the board of directors of the said Memphis and Little Rock Railroad Company, as reorganized, it was ordered that the president and secretary of said company issue the bonds and execute a mortgage on all the property hereinafter named, on the terms and conditions hereinafter set forth, for
the purpose of securing the payment of the said bonds of
125 said railroad company, as reorganized, according to their tenor and effect; and whereas the said party of the first part has issued, or prepared for issue, for the purposes and by the authority aforesaid, twenty-five hundred and seventy-five bonds, of one thousand dollars each, which are numbered from 1 to 2575, inclusive, and one hundred bonds of two hundred and fifty dollars each, which are numbered from 2576 to 2675, inclusive, amounting in the aggregate to the sum of two millions six hundred thousand dollars, all bearing even date herewith, and all of like tenor, and substantially in the following form:

STATE OF ARKANSAS:

Memphis and Little Rock Railroad Company (as reorganized).

Know all men by these presents, that the Memphis and Little Rock Railroad Company (as reorganized) acknowledges itself indebted and promises to pay to ——— ———, or bearer, at the office of the Central Trust Company, in the city of New York, on the first day of July, A. D. nineteen hundred and seven, one thousand dollars of lawful money of the United States of America, with interest thereon from the first day of July, 1878, at the rate of four per centum per annum until the first day of July, 1882, and at the rate of eight per centum per annum from July first, 1882, until the maturity of this bond, payable at the times specified in the annexed coupons, on presentation and surrender at the office of the said Central Trust Company of the interest coupons hereto annexed as they severally fall due. And the said railroad company hereby agrees with the holder of this bond that if default shall be made for sixty days in the payment of the interest coupons hereto annexed, that the principal sum of this bond shall immediately become due and payable.

This is one of a series of twenty-six hundred and seventy-
126 five bonds; twenty-five hundred and seventy-five, numbered from 1 to 2575, inclusive, are for one thousand dollars each, and one hundred, numbered from 2576 to 2675, inclusive, are for two hundred and fifty dollars each, amounting in the aggregate to twenty-six hundred thousand dollars, all of which bonds are secured by a mortgage or trust deed, bearing even date herewith, which has been duly executed by said company to William S. Pierson, Watson Matthews, and R. K. Dow, as trustees, conveying to them, among other things, as more particularly set forth in said deed, the charter, franchises, road, rolling-stock, income, lands, and other property of said company.

This bond shall pass by delivery, and shall not become obligatory until authenticated by the certificate of a majority of said trustees.

In witness whereof the said railroad company has caused this bond to be signed by its president, and caused its corporate seal to be hereto affixed, attested by the secretary, and has also caused the interest coupons hereto annexed to be signed by its treasurer under and in conformity to said mortgage this the second day of May, A. D. 1877.

——— ———, *Secretary.*
——— ———, *President.*

On which said bond the following indorsement is made: "The undersigned, a majority of the trustees, hereby certify that this bond is one of a series amounting in the aggregate to $2,600,000, secured by mortgage or deed of trust within mentioned, dated May 2, 1877; said mortgage or deed of trust is made subject to a prior mortgage for $250,000." And whereas said railroad company has determined to secure the payment of said bonds, with the interest thereon, in the manner herein provided: Now, therefore, the said Memphis and Little Rock Railroad Company, as reorganized, party of the
127 first part, in order to secure the due and punctual payment of the before mentioned twenty-five hundred and seventy-five bonds, and the accrued interest thereon, and for and in consideration of the premises, and of the sum of one dollar paid by the party of the second part to the party of the first part, the receipt whereof at and before the ensealing and delivery of these presents is hereby acknowledged, hath granted, bargained, sold, aliened, remised, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, convey, and confirm, unto the said Pierson, Dow, and Matthews, party of the second part, as trustees and in trust, and their successor or successors, and his survivor or survivors and assigns forever, all and singular the railroad and rights of way, from the west bank of the Mississippi river, in or near Hopefield, in the county of Crittenden, and State of Arkansas, to Little Rock, in the county of Pulaski, and State of Arkansas, with the connections of said railroad with the Cairo and Fulton railroad, and the Little Rock and Fort Smith railroad, and any railroad depots or rights of way in the city of Memphis, State of Tennessee, belonging to said railroad company, and all rails, trestles, sidetracks, switches, depots, stations, buildings, water tanks, machine shops, car houses, engine houses, warehouses, workshops, superstructures, engines, cars, wagons, machinery, tools, boats, wharfboats, inclines, oil, fuel, supplies, and equipments, which said railroad company, party of the first part, now own or may hereafter acquire or become entitled to in the States of Arkansas or Tennessee, or elsewhere, pertaining to the main line of said road from Memphis to Little Rock; and also all and singular all lands, real estate, property of every kind, real, personal, or mixed, books of account, records, muniments, and evidences of title and choses in action which are now owned or may hereafter be acquired by said railroad

company, party of the first part; and also the charters, franchises,
rights, privileges, and immunities, including the right of fran-
128 chise to be a corporation, which the said railroad company now
own or possess, or may hereafter own or acquire in the States of Arkansas and Tennessee, or elsewhere; and also all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said railroad company from its railroad or other property, or in any other way whatsoever; to have and to hold all and singular the said premises, properties, and things and rights, and privileges, immunities, charters, and franchises, with their appurtenances hereby conveyed or intended to be conveyed to said party of the second part, their successor or successors, and his or their survivor or survivors, and assigns forever. And the said Memphis and Little Rock Railroad Company, as reorganized, hereby covenants with the party of the second part that it is lawfully seized and possessed of the said granted property, has good right to convey the same in manner and form as aforesaid, and that the same is clear of all incumbrances whatsoever, except the above described mortgage of the Memphis and Little Rock Railroad Company, and as hereinbefore recited, and that it will forever warrant and defend the title thereto against all lawful claims whatsoever: Provided, however, That this conveyance is upon the conditions following, to wit:

First. That so long as the said party of the first part shall not make default in the payment of either principal or interest on any of the aforesaid bonds and coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and conditions of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof.

(Second.) And said party of the first part shall in each and every year after the year 1882 pay to said party of the second part, their
survivor or survivors, successor or successors, for the time be-
129 ing, such sum of money as shall be equal to the difference between the interest for each year, on all outstanding bonds secured by this mortgage, and the sum of two hundred and eighteen thousand dollars; such sum to be paid on the first day of January, in each year, commencing on the first day of January, 1883, with the payment of ten thousand dollars, such moneys to be used by the trustees in the purchase of bonds secured by this mortgage at the lowest price at which they can be had, the bonds so purchased and all coupons attached thereto to be carefully cancelled by the trustees and returned to the company. And said party of the first part further agrees to pay to said trustees, or such trustee as shall take the active management of said sinking fund, one per centum of the par value of the bonds bought in and canceled by them, which shall be received as compensation therefor.

(Third.) And it is further agreed that in case the party of the first part shall fail or neglect to comply with this provision for the purchase of the said bonds, then the said party of the second part, their

survivor or survivors, successor or successors, shall have the same right to enter upon, or sell and convey the property herein conveyed, that they would have under the terms of this conveyance in case of the non-payment of the interest or principal of the said bonds in every respect whatever.

Fourth. Said railroad company, as reorganized, will, from time to time, as incurred, pay all charges, costs, expenses, and compensation of the said party of the second part and their successor and successors, or survivor or survivors, in or about, or for the execution of said trust, and will in all things keep the said trustees or their successors fully indemnified and saved harmless of, from, and against all costs, damages, charges, and expenses which said trustees or their successors may sustain or be put to in consequence of accepting this trust, or of anything which may be done or omitted to be done under it, saving only such damages as may arise from any
130 culpable act or neglect of said trustees. And said railroad company, party of the first part, will cause this deed to be duly recorded in all proper places, and will do whatever else may be necessary or proper to give full effect to this conveyance.

Fifth. In case of default for the space of sixty days shall be made in the payment of any of said interest coupons, or of the principal sum of any of said bonds, as they shall respectively fall due, the said party of the second part, their successor or successors, and his or their survivor or survivors, on the written request of one-third, in interest, of the holders of said bonds, by themselves or by their agent thereto duly authorized, either of said trustees being competent to act as the agent of the other trustees, upon being furnished with funds for expenses and being suitably indemnified against risk and loss, may and shall enter in and upon and take possession of and operate all and singular the said railroad and all other property—real, personal, or mixed—hereinbefore conveyed or intended to be conveyed, and take and receive the income and profits thereof, and may and shall sell all and singular said railroad and lands and all other property—real, personal, or mixed—with all the charters, rights, privileges, immunities, franchises, and choses in action of said railroad company, party of the first part, hereinbefore conveyed or intended to be conveyed, and execute and deliver to the purchaser or purchasers deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title, and interest, whether legal or equitable, of said party of the second part, and of said railroad company, party of the first part, in fee-simple, absolute, free of equity, or redemption of, in, or to said railroad lands, property, charters, rights, privileges, immunities, and franchises, and every part and parcel thereof, and said deeds and conveyances shall forever bar and estop said railroad company, party of the first part.

And the said party of the first part hereby covenants and
131 agrees that said party of the second part, their successor or successors, and his or their survivor or survivors may make said sale, as aforesaid, in the city of Little Rock, or in any town on the line of their said railroad, and with or without entry on said conveyed premises, and may make said sale, as aforesaid, by or

through his or their agent or attorney-in-fact, with the same force and effect as if made by him or them in person or through their proper officers.

And the said party of the first part hereby waives the benefit of any stay, extension, appraisement, or valuation laws which may now or hereafter exist; but before any sale shall be made notice of such intended sale shall be published once in each week for not less than four consecutive weeks, in one newspaper in the city of Little Rock, Arkansas, and in one newspaper published in the city of Memphis, Tennessee.

And the said party of the first part hereby covenants and agrees that said party of the second part may adjourn said sale as many times and for such length of time as they see fit, and any sale made on an adjourned day shall be of the same force and effect as if made on the day first appointed.

And the proceeds of such sale, if made for cash, after paying the costs, charges, and expenses of the said party of the second part or their successors, and of their or his agents or attorneys-at-law or in fact, incurred in and about the said trust, and the said foreclosure, sale, and conveyance, shall be distributed *pro rata* to the holders of the bonds without regard to priority of issue and coupons secured by this trust; but neither in the case of a sale for money, nor in the case of any other sale, judicial or otherwise, shall any of the coupons or interest warrants from said bonds be entitled to or share any of the proceeds of such sale unless the same are held and owned by the actual holders and owners of the bonds to which said coupons were respectively attached at the issue of said bonds. And it is expressly agreed that such coupons as may be held by any other person
132 than the actual owner or holder of the bonds to which they were respectively originally attached shall be considered merely as an unsecured promissory note of said railroad company, and shall not be entitled to the security of this deed of trust. And any surplus, after any sale for money and after making full payment and satisfaction of all the aforesaid bonds, coupons, and interest, and the costs, charges, and expenses, as aforesaid, shall be paid over to the party of the first part.

Sixth. And it is further covenanted and agreed by and between the parties hereto that in case of a sale, whether judicial or otherwise, of said premises embraced in this mortgage, the amount of the bid or purchase-money on said sale may be paid and satisfied in whole or in part by the outstanding bonds or coupons save the detached coupons aforesaid, or any of them secured hereby, and said bonds and coupons shall be received in whole or in part payment and satisfaction by said trustees, their successor or successors, or his or their survivor or survivors, according to their value, to be ascertained and determined by the net amount arising from said sale.

And it is further covenanted and agreed by and between the parties hereto that in case of any sale, judicial or otherwise, of the premises embraced in this mortgage, and the holders of a majority in interest of the then outstanding bonds secured by this mortgage, shall, in writing, request the said trustees, or their successor or suc-

cessors, or his or their survivor or survivors, so to do, they or he is authorized to purchase the premises embraced herein for the use and benefit for the holders of the then outstanding bonds and coupons secured by this mortgage. And that having so purchased said premises, the right and title thereto shall vest in said trustees, and no bondholder shall have any claim to the premises or to the proceeds thereof, except for his *pro rata* share of the proceeds of said premises, as represented in a new company or corporation, to
133 be formed by a majority in interest of said bondholders, for the use and benefit of the holders of the bonds secured hereby.

And whenever the holders of a majority of said bonds shall have organized a new company or corporation for the use and benefit of all the holders of the bonds secured by this mortgage, said trustees, or their successor or successors, or his or their survivor or survivors, shall reconvey the premises so purchased by him or them to said new company or corporation.

And it is further agreed that said trustees, or either of them, may resign and discharge themselves of this trust on publishing notice of such intention to resign in a newspaper published in the city of New York, at least thirty days before such resignation, filing a copy of such resignation with the clerk of the county of Pulaski, in the State of Arkansas, and leaving such resignation with the president or secretary of said Memphis and Little Rock Railroad Company, as reorganized, and that the circuit court of the United States for the eastern district of Arkansas, in case of the death, resignation, or removal of any trustee, on a petition of one-third of the holders of the then outstanding bonds secured by this mortgage, shall appoint a successor or successors in such trust; and the said trustee or trustees so appointed shall thereupon become vested with all the powers, authorities, and estates granted to or conferred upon said party of the second part by these presents, and all the rights and interests requisite to enable them to execute the purposes of this trust without any further assurance or conveyance.

Seventh. And the party of the first part hereby agrees that said party of the second part, their successor or successors, or his or their survivor or survivors, may appoint and employ at the expense of the said trust estate all such attorneys, counsellors, agents, clerks, cashiers, bookkeepers, engineers, or other agents as may be reasonably necessary in the execution of any of the trusts herein
134 or hereby declared or created, and may fix their compensation, and shall not be answerable for the defaults or other misconduct or neglects of such attorneys, counsellors, cashiers, clerks, bookkeepers, engineers, or other agents, unless chargeable with culpable negligence in their selection; and further, that neither of said trustees shall be answerable for the acts, omissions, or defaults of his associate or associates, nor shall either of them, or their successor or successors, or survivors or survivor, be responsible for anything short of gross negligence or willful defaults in the discharge of his duties.

And the party of the first part hereby declares and agrees that

where the words "trustee" or "trustees," or "party of the second part," are hereinbefore mentioned it shall mean and be construed to mean the party of the second part and their successor or successors, whether named in this indenture or appointed by the court, and his or their survivor or survivors and assigns.

And said party of the first part further agrees that the lithograph signature of its treasurer upon the coupons attached to the bonds hereinbefore mentioned shall be deemed the written signature of its said treasurer, and of equal force and effect.

In witness whereof, the said Memphis and Little Rock Railroad Company, as reorganized, hath caused this indenture to be subscribed by its president and secretary and treasurer, and hath caused its corporate seal to be hereunto affixed on the second day of May, 1877.

(Signed) M. B. PRICHARD, *President.*
[SEAL.] (Signed) JOHN W. GOODWIN,
Secretary and Treasurer.

Witness: ——— ———.

135 STATE OF ARKANSAS, } ss:
County of Pulaski, }

On this day, before me, a duly appointed, commissioned, and qualified notary public in and for said county, came M. B. Prichard and John W. Goodwin, to me well known as the persons executing the foregoing deed; and the said M. B. Prichard, being by me duly sworn, made oath that he is the president of the Memphis and Little Rock Railroad Company, as reorganized, and that the seal of said company thereto attached is the genuine seal of the said company, and that the same was duly attached to the said deed by his direction, and in his presence, on this day; and the said John W. Goodwin, being duly sworn, made oath that he is the secretary and treasurer of said Memphis and Little Rock Railroad Company, as reorganized, and that the said seal is the genuine seal of the said company, and that the same was duly attached to the said deed in his presence on this day, and both the said M. B. Prichard and the said John W. Goodwin acknowledged that they had respectively executed the said deed in their official capacity as such president and secretary and treasurer for the consideration and purposes therein mentioned and set forth.

(Signed) M. B. PRICHARD, *President.*
[SEAL.] (Signed) JOHN W. GOODWIN,
Secretary and Treasurer.

Sworn to and subscribed before me.

Witness my hand and official seal at the city of Little Rock, this second day of May, 1877.

(Signed) FRANK STRONG,
Notary Public.

NOTE.—The foregoing deed of trust is recorded in—
Pulaski county, Record Book A B 6, page 178, May 3, 1877.

Lonoke county, Record Book	J,	page	275, May 8, 1877.
St. Francis county, "	U,	"	131, etc., May 21, 1877.
Cross county, "	D,	"	39 to 50, May 24, 1877.
Prairie county, "	D,	"	30 to 37, May 11, 1877.
Woodruff county, "	F,	"	388 to 367, May 15, 1877.
Monroe county, "	F,	"	401 to 415, May 19, 1877.
Lee county, "	F,	"	305 to 314, May 28, 1877.
Crittenden county, "	S,	"	183 to 191, May 30, 1877.
Shelby Co., Tenn., "	119,	"	42 to 54, June 16, 1877

136 *Supplemental Mortgage.*

This indenture, made by and between the Memphis and Little Rock Railroad Company, as reorganized, a corporation duly organized under the laws of the State of Arkansas, party of the first part, and William S. Pierson, R. K. Dow, and Watson Matthews, party of the second part, witnesseth:

That whereas the said party of the first part executed to the said party of the second part its certain deed of mortgage, dated on the second day of May, 1877, and by inadvertence there was omitted from the said mortgage the following clause, that is to say, "that so long as the party of the first part shall not make default in the payment of principal or interest of said bonds, it shall retain possession of all the property hereby conveyed, and receive and enjoy the income thereof; and that until such default the party of the first part shall have the right to sell and convey, free from this trust, any and all of the lands hereby granted not necessary or convenient to the operating of the said railroad, applying the proceeds thereof to the improvement and betterment of said railroad, its stock, and equipments;"

And whereas none of the bonds mentioned in the said mortgage have as yet been issued, and it is desired to correct the said omission: It is now agreed between the parties hereto that the clause thus omitted from the said mortgage shall form a part thereof, with the
137 same effect, to all intents and purposes, as if it had been incorporated in the said mortgage immediately before the attesting clause of said mortgage; and, in order that all persons interested may have notice of this amendment, it is further agreed that this indenture shall be recorded in the several counties in which the lands mentioned in said mortgage lie, and that there shall be an indorsement on each of the said bonds to be secured by the said mortgage a reference to this indenture.

In testimony whereof the said Memphis and Little Rock Railroad Company, as reorganized, hath caused this indenture to be subscribed by its president and secretary and treasurer, and hath caused its corporate seal to be hereunto affixed, on this twenty-sixth day of September, in the year of our Lord 1877.

[SEAL.] (Signed) M. B. PRICHARD, *President.*
JOHN W. GOODWIN,
Secretary and Treasurer.

STATE OF ARKANSAS, }
County of Pulaski, } ss:

On this day, before me, a duly appointed, commissioned, and qualified notary public in and for said county, came M. B. Prichard and John W. Goodwin, to me well known as the persons executing the foregoing deed, and the said M. B. Prichard, being by me duly sworn, made oath that he is president of the Memphis and Little Rock Railroad Company, as reorganized, and that the seal thereto attached is the genuine seal of said company, and that the same was duly attached to the said deed by his direction and in his presence on this day; and the said John W. Goodwin, being duly sworn, made oath that he is secretary and treasurer of said Memphis
138 and Little Rock Railroad Company, as reorganized, and that the said seal is the genuine seal of the said company, and that the same was duly attached to the said deed in his presence on this day; and both the said M. B. Prichard and the said John W. Goodwin acknowledged that they had respectively executed the said deed in their official capacity as such president and secretary and treasurer, for the consideration and purposes therein mentioned and set forth.

Sworn to and subscribed before me.

Witness my hand and official seal as such notary public, at the city of Little Rock, on this twenty-sixth day of September, 1877.

[SEAL.] (Signed) J. D. DARDEN,
Notary Public, Pulaski County, Ark.

139 Read on part of plaintiffs:

In the Circuit Court of the United States for the Eastern District of Arkansas.

R. K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Trustees,
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized.

To the honorable judges of said court:

For your information your receiver makes the following statements: It appears from the books of the defendant, which have come to his hands as receiver, that on the 27th day of March, 1884, defendant had in its treasury in money the sum of $42,123.68.

It further appears that after the 27th day of March, and prior to the 11th day of April, on which day this receiver was appointed, it paid out on vouchers for the month of March $46,458.16.

The amount of money in the treasury of the defendant upon the day on which your receiver took possession, and which was delivered to him upon the order of the court, was $32,216.20.

Respectfully, RUDOLPH FINK, *Receiver.*

Endorsed: Filed April 25, 1884.

140 In the Supreme Court of the United States.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Appellant,
v.
R. K. DOW, WATSON MATTHEWS, and CHARLES MORAN, as Trustees, Appellees. } No. 1120.

and

R. K. DOW, WATSON MATTHEWS, and CHARLES MORAN, as Trustees, Appellants,
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as reorganized, Appellees. } No. 1184.

In the above causes it is agreed by the parties herein that there is a diminution of the record, and that such diminution could be supplied and the record made complete by certiorari.

It is further agreed and stipulated that the annexed papers printed and written are true copies of papers filed in said cause and marked as indicated, and which were part of the record thereof, and all of which papers were, through error, omitted by the clerk in making up the transcript of the record in these causes.

It is further stipulated and agreed that suggestion of diminution of the record and issue of certiorari be and they are hereby waived, and in lieu thereof the papers hereto attached shall be made and considered a part of the record of these causes as though the same
141 had been duly copied and certified by the clerk of the court below.

Further it is agreed and stipulated that the record heretofore filed in this court with the papers hereto attached and herewith filed do make a true, perfect, and complete transcript of the record in this cause as it was in the court below, except the papers referred to in agreement of counsel, p. 49 of printed transcript, and all errors and omissions of the clerk in the court below and in his certificate to the record are hereby waived, and that these causes may be heard and decided upon the record as hereby amended and completed.

THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY, AS REORGANIZED,
By B. C. BROWN, *Gen'l Counsel.*
R. K. DOW ET AL.,
Appellants and Appellees,
By U. M. ROSE, *Sol.*

Feb. 28, 1885.

Endorsed on cover: Supreme Court U. S. 1884, October term. Nos. 1120 & 1184. The Memphis & Little Rock R. R. Co., app't, *vs.* Robert K. Dow *et al.*, and Robert K. Dow *et al.*, app'ts, *vs.* The Memphis & Little Rock R. R. Co., as reorganized. Stipulation waiving writ of certiorari & amending record. Filed March 14, 1885.

124-65

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 125.

THE MEMPHIS AND LITTLE ROCK R. R. CO. (AS REORGANIZED), APPELLANT,

vs.

ROBERT K. DOW ET AT., TRUSTEES.

No. 165.

ROBERT K. DOW ET AL., TRUSTEES, APPELLANTS,

vs.

THE MEMPHIS AND LITTLE ROCK R. R. CO. (AS REORGANIZED).

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1 *Opinion by Brewer, Circuit Judge.*

In the Circuit Court of the United States for the Eastern District of Arkansas. April Term, 1884.

R. K. Dow *et al.*, Trustees, Complainants,

v.

THE MEMPHIS AND LITTLE ROCK R. R. CO., as Reorganized, Defendant.

On defendant's motion to modify the order appointing the receiver.

U. M. & G. B. Rose, attorneys for plaintiff; B. C. Brown, attorney for defendant.

The defendant's mortgage in terms conveyed "all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits, and advantages had, received, or derived by the said railroad company from its railroad or other property or in any other way whatsoever."

There was also in the mortgage a stipulation for the retention of possession by the mortgagor until default of the payment of interest.

On April 15th a receiver was appointed and the defendant was required by the order of this court to deliver to him all its property, including therein the moneys then on hand. At that time it had in its possession $32,216.20.

Thereafter the defendant moved to strike from the order so much as required it to deliver to the receiver these moneys.

It is admitted that these moneys were derived solely from the operation of the road and the use of the mortgaged property.

2 This, therefore, is the question presented: Could the mortgagor, having in his possession unexpended earnings of the mortgaged property, be compelled to turn those earnings over for the benefit of the mortgagee.

The general proposition is of course beyond dispute that when a mortgagee allows a mortgagor to remain in possession after default the latter takes the rents and profits to his own use, and the former cannot require him to account therefor nor recover them from him.

It were mere affectation of learning to go into any extended investigation of this question. The doctrine is fully stated in Jones on Mortgages as follows: So long as the mortgagor is allowed to remain in possession he is entitled to receive and apply to his own use the income and profits of the mortgaged estate. He is not liable for the rent; his contract is to pay interest and not rent.

Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise the right he cannot claim the profits. Upon a bill in equity to obtain foreclosure and sale he may in proper cases apply for the appointment of a receiver to take for his benefit the earnings of the property.

If he neglect to do this the final decree, if silent upon this subject, does not affect the mortgagor's possession or right to the earn-

ings in the meantime. The sale under the decree, except where statutes provide otherwise, wholly divests him of title, and consequently of right to possession.

These principles are the same whatever be the subject of the mortgage. Although the mortgage be given by a railroad company and by its terms includes not only its property and franchises, but also the tolls, rents, and profits to be had, gained, or levied therefrom, but it is implied from the mortgage that the company is to hold possession and receive the earnings of the road until the mortgagees take it or the proper judicial authority should
3 interpose. The possession, so long as it is continuous, gives the right to receive the income of the road and to apply it to the general purposes and debts of the company.

So long as the company is allowed to receive the income of the road it is within its discretion to decide what should be done with it. The mortgage does not affect the application of it. If the mortgagees want it they must take possession of the road or, pending a bill to foreclose the mortgage, apply for the appointment of a receiver. Upon the appointment of a receiver he cannot maintain a suit to recover earnings of the road in the hands of an agent which accrued before the receiver's appointment.

"In like manner if the mortgage be of leasehold premises and the mortgagor hold over after breach of the condition the law does not imply an obligation on his part to pay rent previous to an entry by the mortgagee." Section 670.

"The mortgagor while in possession is entitled to the rents. So long as the mortgagor is allowed to remain in possession without an actual entry by the mortgagee, although there has been a breach of the condition of the mortgage, he is entitled to receive the rents and profits to his own use and is not liable to account for them to the mortgagor. If the premises are under lease the right of the mortgagor in possession to the rents is the same whether the lease was made before or after the mortgage. He may lawfully receive the rents until the mortgagee interferes and he receives them to his own absolute use and not for the use of the mortgagee." Section 771.

See also the following authorities cited by counsel for the defendant:

2nd Washburn on Real Property, 156.
Higgins *v.* Building Company, 2nd Atkyns, 107.
Mead *v.* Orrery, 3 Atkyns, 240.
4 Colmon *v.* St. Albans, 3rd Vesey, Jr., 25.
Hughes *v.* Edwards, 9th Wheat., 500.
Wilder *v.* Houghton, 1st Pick., 87.
Bank *v.* Reid, 8th Pick., 461.
Mayo *v.* Fletcher, 14th Pick., 525.
Field *v.* Swan, 10th Metcalf, 112.
Chase *v.* Palmer, 25th Main., 341.
Lang *v.* Wade, 70th Main., 358.

This being the general doctrine, I do not think the use of the word "moneys" enlarges the right of the mortgagee, and if a mort-

gage of the income and earnings does not convey past income and earnings a mortgage of moneys will not convey such moneys as are simply income and earnings.

Such words as these, income, earnings, moneys, are prospective and not retrospective in their operation. The case of Nayes *v.* Rich, 52nd Main., 115, is in point.

In that case the plaintiff had been appointed receiver of a railroad. The defendant had been superintendent and had moneys in his possession which had accrued from running the road. The mortgage conveyed, among other things, the income. The plaintiff sought to recover this money. The court says: "The right of the plaintiff cannot extend beyond the property mortgaged, and the right of the receiver must necessarily have the same limitation. * * * It will hardly be contended that while mortgagors remain in possession they can be compelled to pay the rents and profits of the property to the mortgagees, and yet that is just what is attempted in the case at bar. No one had ever rightfully taken possession under the mortgage until it was done by the receiver, in March, 1860. The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject-matter of the suit in equity, and the receiver was not entitled to it."

See also Railroad Co. *v.* Cowdry, 11 Wallace, 482.

In Gilman *v.* The Telegraph Co., 91 U. S., 615, the contest was between a general creditor of a railroad company and the mortgagee as to moneys in possession derived from the operation of the road, and the rights of the creditor were held paramount.

The court, by Swayne, justice, thus states the law: "A mortgagor of real estate is not liable for rent while in possession. (2nd Kent Com., 171.) He contracts to pay interest and not rent. In Chinnery *v.* Block, 3rd Douglas, 391, the mortgagor of a ship sued for freight earned after the mortgage was given but unpaid. Lord Mansfield said: Until the mortgagee takes possession the mortgagor is owner to all the world and is entitled to all the profit made. It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned; the amount to be so applied was within the discretion of the company; the same discretion extended to the surplus; it was for the company to decide what should be done with it. In this condition of things the whole fund belonged to the company and was subject to its control. It was therefore liable to the creditors of the company as if the mortgagor did not exist; they in no-wise affected it."

In Bridge Co. *v.* Heidelbach, 94 U. S., 800, there was a similar controversy with the same result, and in that the court says: "The
6 mortgage could have no retrospective effect as to previous income and earnings. The bill of the trustees does not affect the rights of the parties. It is an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right; it can only enforce those which exist already. The bill of the trustees is as ineffectual as if the fund were any other property, real, personal, or mixed, acquired by the mortgagee *aliunde*, and never within the scope of the mortgage."

See also Kountze *v.* Omaha Hotel Co., 107 U. S.

It is true in the cases from 91st and 94th U. S., *supra*, the contest was between a creditor of the mortgagor and the mortgagee, but if the income, the moneys, passed by the mortgage then, of course, the rights of the mortgagee must have been adjudged paramount, for in both cases the lien of the mortgage was prior to that of the judgment; so when the court held that the judgment had preference it clearly affirmed that the mortgage did not cover the moneys. In the case from 52 Maine, *supra*, no rights of a creditor had intervened, and the question was solely between the mortgagee and the mortgagor.

Suppose in this case the mortgagor were an individual instead of a corporation, and that he had in his pocket at the time of the appointment of the receiver moneys which he had received from the operation of the road, would it not seem a strange order to compel him to pay over such moneys to the receiver? Could such an order be entered without, in effect, making him responsible for profits, income, moneys received, and if he is liable for any of them is that liability limited to the amount which he has failed to expend? If he is liable at all why is he not liable for all the profits, income, and moneys received? It would seem that no just discrimination could be made, and that the addition of the word "moneys" in the mortgage does not mean anything beyond the words "income and profits, tolls and rents," and must like them be adjudged to have simply a prospective operation.

7 It is true that there is a large equity in favor of turning over this money to the receiver, because the court by other provisions of its order required the receiver to pay certain past indebtedness of the company; but such provisions flow from the mere discretion of the chancellor and cannot be made the basis of invading the absolute right of the mortgagor. If the rents, the profits, the income received by the mortgagor prior to the taking possession were his absolutely and he not liable to account for what he has received, and that such is the law seems to be settled by the authorities, I cannot think the rights of the parties are at all changed by the addition of the word "moneys." Of course, that term would have operation distinct from the word income if there should chance to be in the possession of the mortgagor moneys received from the sale of rolling stock, lands, or other tangible property. My conclusion, therefore, is that, notwithstanding the term "moneys" is used in this mortgage, moneys which are in the possession of the mort-

gagor and received solely from the prior operation of the road belong absolutely to him and cannot be appropriated by the mortgagee.

Again, it is insisted that inasmuch as the application for a receiver was made some days before the appointment and on application of the defendant the hearing of the application was postponed and the *status quo* preserved by the following order: "It is now ordered that both parties have leave until the 7th of April next to file printed briefs on the motion for the appointment of a receiver herein; and it is further ordered that the defendant, until further order herein, hold the property mentioned in the bill herein subject to the order of the court; and the defendant has leave to plead, answer, or demur to the bill of complaint herein on the 7th day of April."

And as it further appears that on the day this order was made the defendant had on hand $42,123.68, and had between that time and the appointment of the receiver paid out $46,458.16, it is ap-
8 parent that the money on hand was in fact money earned during the pendency of this motion and while the directors of the defendants were, in effect, receivers of this court.

I do not think this claim can be sustained because the moneys paid out were paid out for the operating expenses, and could more properly be charged to the earnings of the road during that time than to those funds accumulated at the time the first order was made. In fact, the mortgagee is benefited by the action of the company, for at the time the application was first made it had $46,000.00 on hand which it could have used as it saw fit, and which, to the amount of $14,000.00, it has expended in the payment of those debts, which, by the final order appointing the receiver, were chargable on the future earnings of the road, and to that extent postponed the mortgagees. Still, again, it is insisted that certain judgment creditors have intervened, and the court is asked to turn this money over to the interveners instead of back to the company.

Doubtless in the hands of the company it can be reached by creditors, but I think the right of the corporation to prefer its creditors should not be defeated by the action of the court in taking in the first instance moneys into its possession which ought properly to have been left with the company.

In this equitable suit to foreclose a mortgage it is not the province of the court to determine what creditors the company should pay with such moneys or property as do not fall within the terms of the mortgage, and which should have been left within the absolute dominion of the debtor, subject to its own appropriation or to seizure by creditors in the ordinary processes of the law.

I think, therefore, the motion of the defendant should be sustained and the moneys returned to the company defendant, and it is so ordered.

(Indorsed:) Filed July 9th, 1884. Ralph L. Goodrich, clerk, by W. P. Feild, D. C.

9 In the United States Circuit Court for the Eastern District of Arkansas.

Dow *et al.*
v.
THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY. } 603.

CALDWELL, *J.*:

I dissent from the judgment of the court on the motion to strike out that portion of the order in this case which requires the company to turn over its moneys on hand derived from the operation of its road.

The money was turned over to the receiver with the other property included in the mortgage and is now in the hands of the receiver.

The order requiring the company to turn over the mortgaged property follows the language of the mortgage; it is neither broader nor narrower. In effect, therefore, the motion is one to strike an important clause out of the mortgage, viz., all that relates to the income and earnings of the road and the money of the company on hand.

I think the order was properly framed in the language of the mortgage and that the receiver is entitled to all the property and money covered by the mortgage which was in the possession of the company at the date of the order, and upon which no third party had acquired any lien. The Gilman and Heidelbach cases (91 and 94 U. S.) are not in point.

Here the controversy arises between mortgagor and mortgagee.

The money was earned and came into the possession of the company after the bill for a receiver was filed.

10 The operating expenses of the road for the period during which this money was earned were not paid by the company, and these expenses, together with all liabilities incurred by the company for a much greater period, the receiver is required to pay.

The company by its answer confesses its insolvency.

Judgments have been obtained against the company on interest coupons cut from the first-mortgage bonds and executions have been issued on these judgments, and the plaintiffs in the judgments claim the money should be paid to them, or to the marshal to be applied on their executions, in case it is held that it is not properly in the hands of the receiver; but they do not contest the right of the receiver.

On this state of facts the receiver is the proper custodian of the fund, and it should be treated as part of the mortgaged estate and administered accordingly. In the language of Judge Bradley in N. C. R. R. Co. *v.* Drew, 3 Wood, C. C. R., p. 712, "It is as much a part of the mortgaged premises as are the rails or the cross-ties of the road."

I am satisfied that when a railroad company mortgages its income, earnings, and moneys that as between the company and its mortgagee upon a bill filed by the mortgagee for default in payment of the mortgage debt and for a receiver the mortgage is effectual to pass the right to the money derived from the operation of the road in the treasury of the company unappropriated, and upon which no third party has acquired any legal or equitable claim at the date of the order appointing the receiver.

If on the facts of this case the receiver is required to return this money to a confessedly insolvent company then the provisions of the mortgage relating to the earnings and income and moneys are nugatory.

The bill in this case is in effect one for specific performance.

11 It resolves itself down to this question: Is it competent for a railroad company by contract to give its creditors a right to or lien upon the income and earnings of its road and its earnings which will be effectual against the company in equity, when such earnings and income are actually in its treasury unappropriated, and upon which no third party has acquired any claim or lien, and when the company is insolvent and has not paid the operating expenses of its road for the period during which the money was earned?

When a court of equity on a bill filed for specific performance of such a contract gets possession of the money will it return it to the insolvent company upon the ground that it is not bound by its contract? I think not. The company is estopped by its deed from setting up a claim to the money.

12 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 14th day of April, anno Domini one thousand eight hundred and eighty-four, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on July 15, 1884:

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN
v.
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY, as Reorganized. } 603.

Now, on this day, came said plaintiffs, by U. M. & G. B. Rose, their solicitors, and also came said defendant, by J. M. Rose, its solicitor, and also came F. H. Cossitt, W. G. Wheeler, Charles Moran, William Clark, R. K. Dow, A. D. Juilliard, H. M. Juilliard, E. C. Stokes, George Dow, and Martha L. Dow, by U. M. & G. B. Rose, their solicitors, and the claims and interventions of said last-named parties being now submitted to the court, the court is of opinion that on

the face of their interventions they are not equitably entitled to any part of the fund in court.

Wherefore it is now ordered and decreed that said claims and interventions be dismissed for want of equity, and that said interveners pay all the costs of their several interventions herein; and thereupon said Cossitt, Wheeler, Moran, Clark, R. K. Dow, A. D. Juilliard, H. M. Juilliard, E. C. Stokes, George Dow, and Martha L. Dow pray an appeal from this decree to the Supreme Court of the United States, which is granted.

13 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 24th day of October, anno Domini one thousand eight hundred and eighty-seven, at the United States courtroom, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit, on November 1st, 1887:

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN
v.
THE MEMPHIS & LITTLE ROCK RAILROAD COMPANY, as Reorganized. } 603.

Now, on this day, came said plaintiffs, by U. M. & G. B. Rose, their solicitors, and also came said defendant, by J. M. Rose, its solicitor, and by leave of the court file here their agreement in writing, which is in words and figures following:

In the United States Circuit Court for the Eastern District of Arkansas.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Trustees,

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

In order to lessen the size of the transcript for the Supreme Court in this case it is agreed that on the final hearing the evidence showed that at the time the order was made herein, on the 27th day of March, 1884, giving time for filing briefs, the defendant had on hand in money $42,123.68 and had between that time and the appointment of the receiver paid out $46,458.16, leaving in its
14 hands when the receiver was appointed $32,216.20 on striking balance of receipts from operating the road and payments

made by the company, as stated in the opinion delivered in the cause by the circuit judge.

Nov. 1, 1887.

(Signed) U. M. & G. B. ROSE, *For Pl'ffs.*
J. M. ROSE,
For M. & L. R. R. R. Co.

15 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Whereas in a certain suit in said circuit court between Robert K. Dow, Watson Matthews, and Charles Moran, trustees, complainants, and The Memphis and Little Rock Railroad Company (as reorganized), defendant, which suit was removed to the Supreme Court of the United States by virtue of appeals agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That there are on record in the court below various orders that are not copied in the record in this court and which are essential to a full understanding of this case:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice of said Supreme Court, the 15th day of November, A. D. 1887.

JAMES H. McKENNEY,
Clerk Supreme Court of the United States.

16 UNITED STATES OF AMERICA,
Eastern District of Arkansas, W. D.:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, western division, in the eighth circuit, hereby return on the within writ to me directed that in obedience thereto I hereto append correct copies of records and proceedings in the cause named therein which now remain in said circuit court, the same being made a part of this return.

In witness whereof I have hereunto set my hand and the seal of said court this 18th day of November, A. D. 1887, and of the Inde-

pendence of the United States of America the one hundred and twelfth.

{ The seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A. }

Attest: RALPH L. GOODRICH, *Clerk.*

Fees, $6.35, paid by Dow *et al.*, trustees.

17 [Endorsed:] Nos. 125, 165. Sup. Court U. S. 1887, Oct'r term. The Memphis & Little Rock R. R. Co. (as reorganized), app't, *vs.* Robert K. Dow *et al.*, and Rob't K. Dow *et al.*, app'ts, *vs.* The Memphis & Little Rock R. R. Co., &c. Writ of certiorari & return.

[Stamped:] Office Supreme Court U. S. Filed Nov. 22, 1887. James H. McKenney, clerk.

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MAR 7 1885
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

NO. 1184.

R. K. Dow, Watson Matthews and Charles Moran, Trustees, } *Appellants.*

v.

The Memphis & Little Rock Railroad Company, as Reorganized, } *Appellees.*

Appeal from the United States Circuit Court for the Eastern District of Arkansas. In Chancery.

BRIEF FOR APPELLANTS.

Mitchell & Bettis, Printers and Binders, Little Rock.

IN THE

Supreme Court of the United States.

NO. 1184.

R. K. Dow, Watson Matthews and Charles Moran, Trustees, } *Appellants.*

v.

The Memphis & Little Rock Railroad Company, as Reorganized, } *Appellees.*

Appeal from the United States Circuit Court for the Eastern District of Arkansas. In Chancery.

BRIEF FOR APPELLANTS.

The record shows that the bill was filed on the 27th day of February, 1884. It was a bill for possession under a mortgage given for the security of coupon bonds. It was charged in the bill, and admitted by the answer, that the interest accruing semi-annually on the bonds remained in arrear since July 1, 1882. (Rec. 13, 66.) The defendant filed an answer claiming that the bonds were issued without consideration, although it conceded that it had issued them in payment of the purchase money for the road and all the

property it possessed; and also, with a depth of metaphysical penetration rarely attained, that the corporation in the act of issuing its bonds, had been placed under duress by its stockholders and directors. The answer also admitted that this same defense had been interposed in two other suits, and that in both cases the adjudication had been adverse to the company. (Rec. 68-9.) One of these suits was in the court below and the other was in the Southern District of New York, a case in which the learned court remarked concerning the singularly abtruse and erudite claim of the company that it had the right to cancel all of its bonds for the benefit of its stockholders, that the case was "phenominal in the audacity of the attempt to induce a court of equity to assist a corporation in repudiating its obligation to its creditors, without offering to return the property it acquired by its unauthorized contract with them."

Memphis & Little Rock R. R. Co. v. Dow, 19 Fed. Rep. 393.

The same opinion was approved by the court below:

Dow v. Memphis & Little Rock R. R. Co., 20 Id. 263.

The bill also charged that in order to avoid the payment of its debts, the defendant had colluded with Russell Sage, and had procured a receiver to be appointed for all of its property, and that the court below had finally discharged the receiver on the ground that the litigation was clearly collusive. (Rec. 14.)

Sage v. Memphis & Little Rock R. R. Co., 18 Fed. Rep. 571.

The answer admits that this decision was made. (Rec. 72.)

Though the answer relied on affirmative matters of fact set up in avoidance of the bonds, yet defendant introduced no evidence to support it; and the case was heard on bill, answer and replication. There was a decree in accordance with the prayer of the bill; and defendant appealed.

At the time that the receiver was appointed below the defendant was directed to deliver to him all of the property described in the mortgage, including all of its moneys on hand. The defendant then filed an exception to that part of the order relating to the moneys, saying that they were derived "from its income, and the income of said property," and that at no time had "said plaintiffs ever demanded possession of the property in said mortgage mentioned, or of any part of such property." (Rec. 86.)

On further consideration the court, or at least the circuit judge, was of the opinion that the mortgage did not cover the money on hand; and he directed it to be returned to the company which had in its answer admitted its insolvency, and which had not paid a cent of interest or principal on its bonded debt for two years, and which had done all it could to set legal process at defiance. The amount then directed to be paid to the recalcitrant company,—presumably for distribution by way of a bounty among the stockholders—a company that had appropriated the earnings of the road for two years, to purposes undisclosed in this record, but certainly not in accordance with the terms

contained in the covenants of the mortgages which it had executed—was $32,216.20. (Rec. 97.)

The trustees appealed in respect of this branch of the controversy, and the Railroad Company now moves to dismiss the appeal because:

1. "The appellants had no interest in the matter of said order, and [hence] no right to appeal therefrom."

2. "Because their said appeal gives this court no jurisdiction."

3. "Because the matter so ordered was a matter within the discretion of the court below, from which no appeal lay."

Joined with this is the usual motion to affirm because the appeal is frivolous.

I.

As to the Motion to Dismiss.

We confess that with the best intentions, we have not been quite able to fathom the brief of counsel on the motion to dismiss. The inconclusiveness of the argument is fairly equalled by the bewildering character of the authorities cited.

Can any one tell how it was that the Appellants had "no interest" in an order that deprived the bondholders, whom they represented, of such a large sum of money? If they were not interested in the order, who was? Can any one explain how it is that this court has no jurisdiction on the appeal, when it is conceded that the court below had

jurisdiction of the parties and of the subject matter of the suit, and that the amount in controversy falls within the limits of the jurisdiction of this court? Can any one say how it is that the adjudging of such a large sum of money to one party, and away from another party, is a mere matter of discretion? We had supposed that judicial discretion dealt mainly with matters of practice, and that it could never be invoked to establish an absolute right to money or property specifically claimed by contending parties. If the motion here contended for with apparent gravity could once receive the sanction of this court, its appellate jurisdiction would be a thing of the past; for the same discretion which could thus dispose of a large sum of money would be adequate to the disposal of lands and personalty; and the law is well settled that alleged errors in matters of mere discretion cannot be corrected on appeal.

In respect of fitness and applicability to the questions thus presented—if questions they may be called—the cases cited by counsel for Appellee are no better than any other cases taken at random from any page of a digest of the reports.

In *Smith v. Trabue, 9 Peters, 4*, the court held that an order for a writ of restitution was not a final order from which an appeal would lie, simply because it was in its nature interlocutory, and as such might be recalled at any time before final judgment. The cases of *Gregg v. Forsyth, 2 Wall, 56*, and *Barton v. Forsyth, 5 Id., 190*, decide precisely the same thing, namely, that an appeal will lie only from a final order or judgment.

The question below was as to what property, using the word in its largest sense, was covered by the mortgage. If it had been a question as to any specific lands, or specific personalty, and the court below had adjudicated the property to either one or the other claimant, can any one doubt but that the defeated party might appeal? And how could the like adjudication as to a sum of money stand on any other or different ground?

The strongest point contained in the argument for Appellee is to be found in certain words and phrases which must be quoted literally, italics and all:

"The case nearest analogous to this which I can find is *Mail Company v. Flanders, 12 Wall, 132.*

"In that case the court, without jurisdiction, took into its possession property in possession of an agent. Upon its error being shown it restored the property *to the person from whom it was taken.* The complainant appealed, but the appeal *was not allowed to delay restitution*, and this court fully approved the action of the court below."

Not the slightest analogy between the case of *Mail Company v. Flanders* and the case now before the court can be traced. In that case the Appellant had caused a certain steamboat to be taken into custody. The court below had no jurisdiction either of the persons of the litigants, nor over the steamboat that was seized. On submission in this court the counsel for Appellant confessed that as the court below had no jurisdiction to seize the property, error could not be predicated of the order restoring it to its lawful custodian. But the court did not dismiss the appeal; it

affirmed the decree below. There is no warrant in the case for the assertion of counsel that "the appeal *was not allowed to delay restitution*." It does not appear by the reported case that a supersedeas was ever applied for, or that it was given or refused.

As to the money claimed by the Company in the court below, the decree disposed of it eventually. The decree lacked no element of finality; it was ultimate, decisive. If the Railroad Company had got hold of the money that would have been the end of it. It would have been beyond the reach of the plaintiffs, who could have no claim upon it, unless through their constitutional and statutory right of appeal.

Here perhaps this brief ought to stop; for the obvious meaning of the sixth rule of this court is, that a motion to affirm on the ground that the appeal is frivolous, can only be joined to a motion to dismiss that is based on some substantial grounds. A motion to affirm cannot rest on a motion to dismiss, which is plainly without merits. But as we do not fear an inquiry as to the good faith of the appeal, we shall proceed to the second point.

II.

Is the Appeal by the Trustees frivolous?

In this case the mortgage conveyed all the property of the Company, "*and also all the income, rents, issues, tolls, profits, receipts, moneys, rights, benefits and advantages had, received or derived by the said Railroad Company from its railroad or other property, or in any other way whatsoever.*"

Without any such provision the trustees would have had the right to enter upon the property conveyed and to apply the income of the road to the payment of the mortgage debt, upon a breach of the conditions of the mortgage.

Fitzgerald v. Beebe, 7 Ark., 311.

Gilchrist v. Patterson, 18 Id., 579.

If the elaborate provision contained in the mortgage, and quoted above, only applies to income accruing after the acquisition of possession by the trustees, it is clear that it has no operative effect whatever. By the ruling of the circuit judge it was disregarded, and the mortgage was construed precisely as it must have been construed if this clause had never been written.

That cannot be a sound rule of interpretation of a contract which ascertains the meaning of parties by a preliminary cancellation of covenants which they have deliberately expressed. On the contrary, in construing a deed, every part of it must be made, if possible, to take effect, and every word must be made to operate in some shape or other, and the construction must be such as will preserve all parts of the instrument, and the instrument itself in its integrity.

Broom Leg. Max., 414.

Courts will not introduce into a deed words which are not to be found there, nor strike out of a deed words which are there in order to make the sense different.

Id., 417.

Of all the rules of interpretation this is the most fundamental and important. It was violated in this case; for a

provision in a conveyance that is entirely diregarded is no better than if it had been stricken out.

It is clear that the cases cited for Appellee are not in point.

In *Galveston R. R. Co. v. Cowdry, 11 Wall, 483*, the plaintiffs claimed the income which had accrued before the beginning of the litigation. The court said:

"This claim raises the question whether a mortgage of tolls and income makes the mortgagor or his assignees accountable therefor, before demand made by the mortgagee. In this case it does not appear that the complainants or their trustees made any demand for the tolls and income *until they filed the present bill.*"

Of course the filing of the bill was a continuing demand for all tolls and income to be received after the commencement of the suit; but it could not retroact so as to affect such tolls and income as the company might have already acquired.

In the case of *Gilman v. Ill. & Miss. Telegraph Co., 91 U. S., 607*, the claims of a creditor having intervened and having attached specifically to a part of the income, it was held that the right of the creditor was superior to that of the mortgagee. This was obvious, since the creditor was not estopped by the terms of the mortgage, as the mortgagor must have been held to be in case a like claim had been made by the mortgagor; which in that suit was the Railroad Company.

The decision in the case of the *American Bridge Co.*

v. Heidelbach, 94 U. S., 798, introduced no new element into the discussion; and it merely affirmed the previous ruling.

Counsel for Appellee say: "The case of *Noyes v. Rich* [*52 Me., 115*,] is precisely in point."

In this there is an error. The case has no bearing upon that now before the court whatever. In that case the mortgage did not purport to convey the income, or any moneys, or any other thing, save the franchise of the company and its real and personal property. In the opinion the court refer to the case of *Mason v. York and Cumberland R. R. Co.*, in the same volume. (p. 98.) In the opinion rendered in the latter case the court (p. 99) refer to the case of *Re Bondholders of York and Cumberland R. R. Co., 50 Me., 552*, where the mortgage is copied at length. The case of Noyes v. Rich is therefore not "precisely in point." It only decides that where money and income are not mentioned in a mortgage they belong to the mortgagor, until entry of the mortgagee; a familiar principle which few would care to dispute.

So that there is no case cited in which the question presented in this case was either mentioned or discussed. It is clear that the Appellee is estopped by its own contract from claiming the money in court.

On the application for a Receiver the court, on the 27th day of March, 1884, made the following order:

"It is now ordered that both parties have leave until the 7th day of April next to file printed briefs on the mo-

tion for the appointment of a Receiver herein; and it is further ordered that the *Defendant until further order herein hold the property mentioned in the bill herein, subject to the order of the Court;* and the defendant has leave to plead, answer or demur to the bill of complainant herein on the 7th day of April."

This order constituted the Board of Directors of the defendant a Receiver of this court.

Gibbes v. Greenville R. R. Co., 15 Shand, S. C., 518.

S. C. 9 Am. & Eng. R. R. Cases, 723.

15 Shand, 304.

S. C. 9 Am. & Eng. R. R. Cases, 739.

A statement made by the Receiver was then read in evidence, showing that on the day the above order was made the defendant had on hand $42,123.68, and that after that, and prior to April 11th, the day the Receiver was actually appointed, the defendant had paid out on vouchers for the month of March, $46,458.16. The amount of money turned over to the Receiver was $32,216.20. Thus it will be seen that the money turned over, and which the company now seeks to regain, was acquired after the property had been taken into the hands of the court, where it was safe for the trustees, not only as against the defendant, but even as against any outside claimants, if any such there had been.

This statement is not contained in the printed transcript, but is made part of the record by agreement of counsel, it being the same referred to in brief of Appellees.

As the court is forced by the Appellee to look into the transcript, and the object of the 6th Rule is to render a second examination in a certain class of cases unnecessary, we submit that in the exercise of a proper discretion the decree of the court below, so far as impeached by the appeal of the Railroad Company, should be affirmed, the principal appeal being obviously taken for delay merely; and that as to the cross-appeal by the trustees touching the money on hand both of the pending motions should be dismissed.

Respectfully,

U. M. ROSE.

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Office Supreme Court U. S.
FILED.
OCT 22 1887.
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 115.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, AS REORGANIZED, *Appellants,*

v.

ROBERT K. DOW AND WATSON MATTHEWS, TRUSTEES, *Appellees.*

No. 164.

ROBERT K. DOW AND WATSON MATTHEWS, TRUSTEES, *Appellants,*

v.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, AS REORGANIZED, *Appellees.*

Appeals from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND MATTHEWS, TRUSTEES.

U. M. ROSE.

Press Printing Company, Little Rock, Ark.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 115.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, AS REORGANIZED, *Appellants,*

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THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, AS REORGANIZED, *Appellees.*

Appeals from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND MATTHEWS, TRUSTEES.

HISTORY OF THE SUIT.

In the court below the Equitable Life Assurance Society of the United States, Alanson Trask, Virginia M. F. Monroe, Henry G. Marquand and Daniel W. McWilliams, suing for themselves and all others in interest, filed this bill in equity

against the Memphis and Little Rock Railroad Company, as reorganized, Dow and Matthews. (Rec. 63.)

The date of the filing of the bill is not shown in the transcript; but as an amendment to it appears to have been filed on the 1st day of June, 1883 (Rec. 92), it is obvious that the bill had been filed before that time.

The contents of the bill may be condensed as follows:

On May 1, 1877, the railroad company issued bonds to the amount of $250,000, of which those last maturing fell due May 1, 1883; and to secure their payment it executed a mortgage to Dow, Matthews and one Pierson, (who has since died), as trustees, covering its railroad and all of its property; said mortgage being the first lien thereon. Of these bonds plaintiffs are the owners of eighteen, of the aggregate nominal value of $18,000. The railroad company is insolvent, and these bonds are overdue. Dow and Matthews have placed themselves in an attitude of hostility to plaintiffs, so that they cannot safely entrust their interests in their hands as such trustees. On the day after the issue of these bonds and the execution of the mortgage to secure payment of the same, the railroad company issued other bonds, of the aggregate nominal value of $2,600,000, secured by a second mortgage on the same property, made to the same trustees. After Pierson died Charles Moran was appointed trustee in his stead under this second mortgage; and after that time the Supreme Court of Arkansas rendered a decree foreclosing a mortgage claimed to be held by the State, conveying part of the same property, and which had been executed by a former owner, after which Dow, Matthews and Moran, acting as trustees

under said second mortgage, without consulting with plaintiffs, paid off that decree, amounting to $239,600.71. Thereupon they filed their bill in the court below against the railroad company, setting up their acts in the premises, praying that they might be subrogated to the claim of the State under said decree, that they might have a lien on said property prior to that of the mortgage of May 1, 1877, and that the income of the road might be first applied to their reimbursement. Neither plaintiffs or any other holder of any of the bonds of May 1, 1877, was made a party to that suit; which resulted in a decree in accordance with the prayer of the bill, against the property covered by the mortgage of May 1, 1877. The claim under the State decree is not prior to that of plaintiffs, and as plaintiffs were not parties to the suit brought for subrogation, they are not bound by the decree rendered in it. The railroad company has also made default in payment of interest on its second mortgage bonds, and Dow has brought suit at law on coupons of these bonds held by him, and has procured other holders of like coupons to bring like suits, his intention being to have the property sold under execution, so as to extinguish the interests of the plaintiffs. Dow and Matthews would refuse to contest the validity of any part of the decree obtained by them, and if allowed to bring and control a suit for a foreclosure of the mortgage of May 1, 1877, they would greatly delay and hinder plaintiffs in obtaining their rights; and for these reasons plaintiffs have not asked them to bring or prosecute this suit. (Rec. 85.) Prayer for a foreclosure of the mortgage of May 1, 1877, free from the decree subrogating Dow and Matthews to the lien of the State; for a receiver;

that the present trustees may be removed, and that others may be appointed in their place.

In an amendment to the bill above referred to, the plaintiffs made the same allegations in a longer way, and add the following:

Various judgments have been rendered on the second mortgage coupons in the suits already mentioned, and among them one in favor of Dow and another in favor of Moran. In May, 1882, the railroad company filed its bill in chancery in the United States Circuit Court for the Southern District of New York against the trustees, Dow, Matthews and Moran, charging that the bonds issued on May 2, 1877, were without consideration, illegal and void, and praying that they might be canceled; which suit is now pending. Plaintiffs see that by the decree rendered in the suit brought by Dow, Matthews and Moran for the purpose of having themselves subrogated to the rights of the State, they waive any claim of priority over both of the mortgages of May 1st and 2d, 1877, so that plaintiffs have an undisputed first lien on the property embraced in them. There is now pending in chancery in this court (the court below) a suit brought by Russell Sage against the railroad company to enforce a judgment recovered by him against it, inferior to the mortgage lien of plaintiffs, and the property of the railroad company is now in the hands of a receiver appointed in that suit. The intention of the plaintiffs in the coupon judgments is to sell the property of the railroad company under execution as soon as the receiver is discharged; whereas, all debts may be paid out of the income of the road. Since the coupon judgments were rendered, plaintiffs have re-

quested Matthews to bring suit to prevent injury to plaintiffs; but he refused to do so. Prayer that the receiver in the Sage suit may be appointed receiver in this suit, and that plaintiffs' claims may be paid out of the income of the road, and for general relief.

The railroad company filed an answer admitting *seriatim* all the allegations made in the original and amended bills. (Rec. 123.) It was signed by the same counsel who filed the original bill. Dow and Matthews filed an answer. (Rec. 136.) It is only necessary to note what they deny. While admitting that Dow had sued on coupons of the bonds of May 2, 1877, and had advised some of his friends to do so for their better security, the answer denied that they had issued executions on the judgments obtained in those suits, or had intended to do so; but stated that they had filed bills in equity in the court below, setting up the judgments, and asking that the road and other property of the company might be sold to pay them, or that a receiver might be appointed to pay them out of the income of the road, but asking that if a sale should be decreed it should be made subject to the liens of the mortgages of May 1st and 2d, 1877. The answer also states that in the suit brought by Dow, Matthews and Moran, for subrogation to the rights of the State for money advanced by them to pay off the State decree, the railroad company set up in an answer and cross bill, that the bonds of May 2, 1877, were issued without consideration, and that they were illegal and void; but that these contentions were overruled by the court. The answer further says that it is not true that Dow and Matthews had refused to bring a suit to forclose the mortgage of May 1, 1877. On the contrary, they had brought a suit for that pur-

pose, which was then pending in the court below. This answer was filed October 23, 1883. (Rec. 133.)

Replication was filed to the answer of Dow and Matthews. (Rec. 142.)

It is time now to turn to the other case which is embraced in this transcript.

On the 26th day of June, 1883, Dow and Matthews filed a bill against the Railroad Company, setting forth the execution of the mortgage of May 1, 1877, and praying that it might be foreclosed, and that the property might be sold, or that a receiver might be appointed for the purpose of having the mortgage debt paid out of the receipts of the road. (Rec. 1.)

The Railroad Company filed a plea, setting up the pendency of the suit brought by the Equitable Life Association, (Rec. 17,) which on argument was adjudged to be bad. (Rec. 22.) No answer having been filed, the bill was ordered to be taken as confessed. (Rec. 23.)

On motion of both parties the two cases were consolidated. (Rec. 24, 26.)

On the hearing, the Equitable Life Assurance Society *et al.* read the deposition of Mr. John F. Dillon, as follows:

"I was requested by Gov. John C. Brown, or B. C. Brown, —I do not recollect which—to see Watson Matthews. I sent for him and had an interview with him on the 11th day of May, 1883. The result of that interview I embodied in a dispatch to John C. Brown of that date, written immediately after the interview, which dispatch, so far as relates to this matter, reads as follows:

"'NEW YORK, May 11, (1883.)

"'*John C. Brown, St. Louis:*

"'Have seen Watson Matthews. He says he has given Dow power of attorney, and signed certain papers in suit here, so that he cannot file a bill against Dow and others for waste, and that the above may be taken and alleged as his refusal to do so.'

"I had such a conversation, and that was the result of what he said to me, and is correctly embodied in the dispatch which I have read, copied above from my letter-press copy; I have not the original."

No other witness was examined, and no other evidence was submitted.

On final hearing, the court found that there was no testimony to sustain the charges made in the bills of the Equitable Life Assurance Society, and hence they were dismissed. (Rec. 145.) The court entered a decree foreclosing the mortgage of May 1, 1877, and directing the property conveyed by it to be sold by a Master, who was ordered to pay the purchase money into court. (Rec. 26.) The Master was directed to offer the property in the following manner:

"At said sale the Master shall first offer said property, subject to the lien of the decree rendered by this court, on the fourteenth day of May, 1883, in favor of Robert K. Dow, Watson Matthews and Charles Moran, for the sum of two hundred and sixty-one thousand four hundred and fifty-six dollars and twenty-seven cents ($261,456.27); and to the lien of a second mortgage, executed by said defendant on the

second day of May, 1877, to said Dow, Matthews and Pierson, to secure the payment of certain bonds issued by said defendant for the aggregate sum of two million six hundred thousand dollars.

"And if the highest amount bid, subject to these liens, shall equal or exceed the amount due on this decree, including costs of suit, then said Master shall strike off said property to the highest bidder; but if the highest bid be for less than the amount due on this decree, then said Master shall at once, and without further advertisement, proceed to sell said property free of said liens, to the highest bidder, without reservation." (Rec. 31.)

On the 16th day of April, 1884, the railroad company appealed from the decree (Rec. 36), giving a supersedeas bond. (Rec. 37). On the 24th of the same month, Dow and Matthews appealed in the same manner (Rec. 24); and on the 5th of May following, the Equitable Life Assuranee Society and its co-plaintiffs appealed also. (Rec. 146.)

BRIEF.

It is plain that if none of the cases in this court presented any more difficulties than the present, the office of its judges would be a sinecure; and that aspirants to fill vacancies on the bench would be numerous, no very high order of learning or talent being required for the judicial function.

It may slightly simplify matters for us to state that in view of the results of litigation in other suits, involving the same property, which have occurred since the appeal of Dow aud Matthews was prayed, their appeal may be regarded as

of no longer any importance. It is therefore considered as abandoned.

It therefore only remains to consider the charges made by the Equitable Life Assurance Society, and its co-plaintiffs, against Dow and Matthews.

Trimming these charges of all unnecessary verbiage, and making them intelligible as far as may be, they seem to amount to the following:

1. Dow and Moran sued on coupons of the second mortgage bonds, and got judgments, intending to sell the mortgaged property under execution.

To this it may be answered, that as holders of the coupons they had a right to sue on them. Nor could a sale under these judgments have impaired in any way the rights of the plaintiffs below, as it is conceded on all sides, that as holders of the first mortgage bonds they had a prior lien; which, of course, could not be divested in a proceeding which did not attack it, and in which they were not made parties. Nor could there be any execution sale of the railway under execution.

Gue v. Tidewater Canal Co., 24 How., 257.

It was not shown that any execution was ever issued, applied for, or contemplated.

2. Plaintiffs below say that they were not parties to the suit in which a decree was rendered subrogating Dow, Matthews and Moran to the rights of the State, and hence, that the decree is not binding on them.

But they do not deny that their trustees were parties to the suit. If they were parties the plaintiffs were bound by the decree, as they were represented by the trustees.

Kerrison v. Stewart, 93 U. S., 155.

Corcoran v. Chesapeake Canal Co., 94 Id., 741.

Plaintiffs say that the subrogation decree was wrong, but no fact is stated upon which the assertion is based. In short, they plead a conclusion of law, which amounts to nothing. But even if facts had been pleaded, showing that the subrogation decree in favor of Dow, Matthews and Moran, was not a lien prior to that of the mortgage of May 1, 1877, the decree below provides that if the property does not bring enough to pay the amount due on the securities embraced in that mortgage, when sold subject to its lien, and to that of May 2, 1877, it shall be sold "free of said liens to the highest bidder without reservation." So that in any event the plaintiffs below could not be harmed by the subrogation decree.

Finally, what grounds of complaint have the Equitable Life Assurance Society, and its co-plaintiffs, against the decree appealed from. They ask that the trustees, Dow and Matthews, made such by the mortgage of May 1, 1877, shall be removed from their trust. No breach of their trust is alleged against them. Such charges as are made against them, flimsy, unsubstantial and impalpable as they are, relate wholly to a different trust, and are unsupported by proof. The plaintiffs prayed that the mortgage might be foreclosed (Rec. 90), and a decree of foreclosure was rendered. They pray that the trustees may be removed. This was refused, because no

d for removal existed; but the sale under the decree was sted to a Master, whose appointment was not objected to. After the foreclosure decree the trustees had no further duty to perform in which the plaintiffs or bondholders could possibly have any interest. Respectfully,

U. M. ROSE.

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WITHDRAWN

In the Supreme Court of the United States.

No. 125.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY AS REORGANIZED,

Appellant,

vs.

ROBERT K. DOW, WATSON MATTHEWS AND CHARLES MORAN, TRUSTEES.

No. 165.

ROBERT K. DOW, WATSON MATTHEWS AND CHARLES MORAN, TRUSTEES,

Appellants.

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY AS REORGANIZED,

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND OTHERS, TRUSTEES, AND FOR INTERVENORS.

U. M. ROSE.

Press Printing Company, Little Rock, Ark.

In the Supreme Court of the United States.

No. 125.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY AS REORGANIZED,

Appellant,

vs.

ROBERT K. DOW, WATSON MATTHEWS AND CHARLES MORAN, TRUSTEES.

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THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY AS REORGANIZED,

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR DOW AND OTHERS, TRUSTEES, AND FOR INTERVENORS.

HISTORY OF THE CASE.

Dow, Matthews and Moran, on the 27th day of February, 1884, filed their bill in the court below against the railroad company, making the following allegations:

On the 1st day of May, 1877, the railroad company executed a mortgage on all of its property of every kind to Dow, Matthews and one Pierson, the latter being now dead, to secure the payment of an issue of $250,000 of bonds.

On the 2d day of May, 1877, the company executed a second mortgage, by which it conveyed to the same trustees the same property, to secure the payment of a second issue of $2,600,000 of bonds. This mortgage described the property conveyed generally and specifically, and includes "property of every kind, real, personal or mixed, books of account, records, muniments and evidences of title, and choses in action, which were then owned, or might thereafter be acquired," by the mortgagor; and also "all the rents, income, issues, tolls, profits, receipts, moneys, rights, benefits and advantages had, received or derived by the mortgagor from its railroad or other property, or in any other way whatsoever." (* 8.)

The mortgage also contained the following clause:

"That so long as the said party of the first part shall not make default in the payment of either principal or interest of any of the aforesaid bonds and coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions and stipulations of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof." (* 9.)

Pierson having died, Moran has been appointed a trustee in his stead.

The State of Arkansas by a proceeding in chancery had

established a lien on the property thus conveyed prior to both mortgages, for $239,672.71, which the trustees under the second mortgage had paid to the State, in order to prevent the property from being sold; and they had filed a bill in the court below against the company setting up their payment to the State, and praying that they might be subrogated to the lien held by it; in which suit the defendant had interposed the defence that the bonds secured by the second mortgage were illegal, procured by fraud, and were issued without any consideration; which defence was not sustained, the result being that the plaintiff obtained a decree as they had prayed. The railroad company had also filed a bill against the trustees in the second mortgage in the United States Circuit Court for the Southern District of New York, making the same charges of illegality, fraud and want of consideration, and praying that the mortgage and bonds be canceled; but on a final hearing its bill was dismissed for want of equity. In both suits the company alleged that the property embraced in the second mortgage was of far less value than the nominal value of the bonds secured thereby. Attached to the second mortgage bonds are 8 per cent. coupons payable semi-annually on the first day of January and July, until the bonds mature, which will be on the first day of July, 1907. Defendant refused to pay the coupons of July 1, 1882, and has paid none since. Various holders of coupons had got judgments on them, and had filed bills against the company in the court below, asking for the sale of the property of the defendant for payment. Suit had also been brought to foreclose the mortgage of May 1, 1887. In order to cheat, hinder and delay its creditors, the defendant had confessed a judgment in favor of Russell Sage

for a large amount, and had procured him to bring a suit in chancery on the same, and had had the property placed in the hands of a receiver appointed therein, upon which the directors of defendant and all of its officers had resigned, in order to prevent service of process on it. Pending the suit, the court had discharged the receiver on its own motion on the ground that the suit was fraudulent and collusive. The bill charged that by reason of the collusive suit of Sage the defendant had appropriated all of its income to its own use for two years. It was not true that defendant could not have paid interest on its bonds; for its net receipts since its default had never been less than $400,000 a year; but now with the debt due the trustees for payment of the claim of the State, and the accumulations of unpaid interest, the property mortgaged was not a good security for the debt.

The bill prayed that the mortgaged property might be placed in the hands of a receiver pending the suit, that on a final hearing it might be turned over to the trustees under the second mortgage; and for general relief.

The application for a receiver came up on the 27th day of March, 1884, upon which affidavits were read, showing conclusively the fraudulent and collusive character of the Sage suit; and that the officers and agents of the defendant had resigned in order to prevent the service of process.

On that day the court made an order as follows:

"On this day come the plaintiffs, by U. M. & G. B. Rose, their solicitors, and also comes said defendant, by B. C. Brown, its solicitor, and it is now ordered that both parties have leave

until the 7th day of April next to file printed briefs herein; and it is further *ordered that the defendant until further order herein hold the property mentioned in the bill subject to the order of the court*, and defendant has leave to plead, answer or demur to the bill of complaint herein on the said 7th day of April." (*45.)

Defendant filed an answer setting up the same matters that were held to be bad in *Memphis Railroad v. Dow*, *120 U. S.*, *287*, and it admitted that these had been twice adjudicated to be bad as charged in the bill; and it admitted that the receiver in the Sage suit had been discharged for fraud in securing his appointment. (*68, 72.)

It admitted that it was insolvent. (*59.)

On the 15th day of April, 1884, a receiver was appointed. (*79.)

The order was that the defendant should turn over "its railroad, rolling stock, and all other *money* and property of every character, to said receiver."

It was further "ordered that debts, if any, due from the railroad company for tickets and freight balances, and for work and labor performed by its employes and laborers, and [for] material furnished for operating, repairing or improving the road, and all obligations incurred in the transportation of passengers and freight, or for injuries to persons or property, which have occurred within six months past, shall be paid out of the earnings of the road." (*83.)

Defendant moved to strike from this order so much as related to money in possession, saying that it was derived from

its income, and that the plaintiffs had never demanded possession of the mortgaged property. (*86.)

The court took the motion under advisement; but in the meantime directed the money to be surrendered to the receiver, to be by him held subject to its order. (*87.)

The judges were not agreed upon the law; and each delivered an opinion, the circuit judge being of opinion that the motion should prevail; so the money in question, being $32,-216.20, was ordered to be restored to the defendant. In the meantime Cossitt and various other creditors who had recovered judgments in the court below on coupons attached to the bonds of May 1 and May 2, 1877, had filed interventions, praying that the money might be applied in payment of their judgments. Their claims were denied, and they appealed. The plaintiffs also appealed from the order.

When the cause came on for final hearing replication had been filed, and no testimony having been taken, the court decreed that the mortgaged property be turned over to the trustees as prayed in the bill; (*99), and the court fixed a lien on the property for any and all debts and liabilities that might have been incurred by the receiver. (*104.) However, the trustees had no money to pay them with, the company as a meritorious party having gone off with that; and they began business with a balance on the wrong side of the books.

From the final decree the defendant appealed.

The judgment creditors who had intervened for the purpose of having their judgments paid out of the fund in the court, their demands having been rejected, also appealed.

Thus the railroad company which had fraudulently kept the creditors and trustees at bay for two years by means of the appointment of a receiver fraudulently obtained, was finally discharged from the court, with an order on the trustees to pay its debts, and, being itself insolvent, and showing no legitimate uses for the money, it was allowed out of the registry of the court $32,216.20, apparently for distribution among its stockholders. This would seem to have been nothing but a reward for virtue; and as such we venture to think that it was ill-timed. For this we complain.

BRIEF ON APPEAL OF RAILROAD COMPANY.

The suit was one for specific performance, and had nothing in it out of the common run of suits of that kind. It was contended in the court below that the remedy at law was complete; but that position was not tenable.

By the Constitution of Arkansas it is provided that "the rolling stock and all other movable property belonging to any railroad company or corporation in this State shall be considered personal property."

Art. XVII, sec. 10.

Any proceeding at law would have involved a vast number of suits, and must have been in many respects unavailing. In that way choses in action could not have been reached at all; nor could money on hand, to which the deed gave a clear right. A suit in equity afforded the only adequate remedy.

Shaw v. Norfolk R. R. Co., 5 Gray, 162.

Shepley v. Atlantic R. R. Co., 55 Me., 395.

Jones R. R. Securities, sec. 401.

ASSIGNMENT OF ERRORS FOR THE TRUSTEES.

The court erred in striking from the decree that part of it that required the money on hand to be turned over to the receiver.

As was said by Judge Caldwell, D. J., in delivering the dissenting opinion in the court below, and which is copied in the transcript, if the trustees were not entitled to the fund in court, it must have been because the contract of the company as to income and money was void. And yet no reason was given why it should be regarded as void. Persons capable of contracting may make any contract not in contravention of law. If any reason exists why money shall not be made the subject of contract it has not been called to our attention. The only respect in which it differs from any other property that may become the object of judicial proceedings is that it is often more difficult to reach; but in this case that difficulty had been successfully overcome when the court voluntarily surrendered the fund to the defendant for the mere asking.

It is also true, as stated in the dissenting opinion, that if the decree of the court was correct, the clause in the mortgage as to income and money was a mere nullity; for upon a breach of the conditions of the mortgage the trustees were entitled to possession of the other property without reference to that clause.

Fitzgerald v. Beebe, 7 Ark., 311.

Gilchrist v. Patterson, 18 Id., 579.

No case of this kind has been before this court where the contest was simply one between mortgagor and mortgagee, as it is here. In *Galveston R. R. Co. v. Cowdry, 11 Wall., 483,* the court said:

"In this case it does not appear that the complainants or their trustees made any demand for the tolls and income *until they filed the present bill.*"

In the present case, the fund accrued after the bill was filed.

In the court below, counsel seemed much to rely on *Noyes v. Rich, 52 Me., 115.* The court there refer to the case of *Mason v. York R. R. Co.* in the same volume, page 98. In the opinion in that case the court (p. 99) refer to the case *Re Bondholders of York R. R. Co., 50 Me., 552,* where the mortgage is copied at length; and it there appears that the mortgage did not convey either money or income. *Noyes v. Rich* therefore only decides that where neither of these is mentioned they belong to the mortgagor until entry by the mortgagee; a familiar principle which none will dispute.

If the filing of the bill would not fix any money in the hands of the mortgagor, the order made by the court on the 27th day of March, 1884, requiring the mortgagor to hold the property from that time "*subject to the order of the court,*" certainly had that effect. The exact point was decided in

Gibbs v. Greenville R. R. Co., 15 Shand. (*S. C.*), *518.*

S. C., 9 Am. & Eng. R. R. Cases, 723.

And in

S. C., 15 Shand., 304.

S. C. 9 Am. & Eng. R. R. Cases, 739.

The fund in court was received after that date.

Respectfully submitted,

U. M. ROSE.

34-652

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 125.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized,

Appellant,

vs.

ROBERT K. DOW, WATSON MATTHEWS and CHARLES MORAN, Trustees.

No. 165.

ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Trustees,

Appellants,

vs.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY, as Reorganized.

BRIEF FOR THE RAILROAD COMPANY.

WAGER SWAYNE,

Of Counsel for the Railroad Company.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1887.

THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized), Appellant, AGAINST ROBERT K. DOW, WATSON MATTHEWS and CHARLES MORAN, Trustees.	No. 125.
ROBERT K. DOW, WATSON MATTHEWS, and CHARLES MORAN, Trustees, Appellants, AGAINST THE MEMPHIS AND LITTLE ROCK RAILROAD COMPANY (as Reorganized).	No. 165.

BRIEF FOR THE RAILROAD COMPANY.

Statement.

ON MAY 1ST, 1877, the Memphis and Little Rock Railroad Company (as reorganized) executed and de-

livered to Pierson, Dow and Matthews, as Trustees, a mortgage of its railroad and property to secure an issue of $250,000 of its bonds, maturing in installments of $50,000 each on the first day of May, in the years 1879, 1880, 1881, 1882 and 1883, respectively. This mortgage was a first lien and was known as the "*Preference Ten Per Cent. Mortgage*," or, briefly, as the "PREFERENCE MORTGAGE." No installment of principal secured by this mortgage was paid, and on November 1st, 1882, default in the payment of interest was made. In June, 1883, a bill of foreclosure was filed in the Court from which these appeals are taken, by the surviving Trustees Dow and Matthews (the other Trustee, William S. Pierson, having died in 1880), and a decree providing for sale on failure to pay the mortgage debt within thirty days, was entered on April 4, 1884.

ON MAY 2D, 1877, the Railroad Company executed and delivered to the same parties (Pierson, Dow and Matthews), as trustees, another mortgage of its railroad and property, made to secure an issue of $2,600,000 of its bonds, running thirty years and bearing interest at the rate of four per cent. until July 1, 1882, and eight per cent. thereafter. This mortgage was a second lien, and was known as the GENERAL MORTGAGE.

On July 1st, 1882, the Railroad Company defaulted in the payment of the then maturing installment of interest, and paid no installment subsequently falling due.

On February 27th, 1884, Dow, Matthews and Moran, trustees (Moran having been appointed a trustee under this mortgage in place of the deceased trustee), filed their bill IN THE PRESENT SUIT for possession under the

genneral mortgage (Bill of Complaint, Record, p. 1). The defendant answered (Record, pp. 21–37); a receiver was appointed (Record, p. 38); and the cause proceeded to a decree, entered on July 22, 1884, requiring the receiver to deliver to the complainants, as trustees, all the railroad property and mortgaged estate, and making a reference to a Master to ascertain proper allowances, &c. (Record, pp. 46–47).

The Appeal of the Trustees.

The motion for the appointment of a Receiver was made on March 24th, 1884 (Record, p. 10). On the 27th of the same month the following order was entered:

"On this day comes, &c., * * * and it is now ordered that both parties have leave until the 7th day of April next to file printed briefs on the motion for the appointment of a Receiver herein; and it is further ordered that the defendant, until further order herein, hold the property mentioned in the bill, subject to the order of the Court. And the defendant has leave to plead, answer or demur to the bill of complaint herein, on the said seventh day of April" (Record, p. 19).

The order or decree appointing the Receiver was made on the 15th of April, 1884. The order directed the receiver to take, and the railroad company to surrender to him, among other things all the moneys in its possession (Record, pp. 38–41).

At a later date in the same month the defendant filed an exception to so much of this order or decree appointing the Receiver as directed him to take, and the defendant to deliver to him the moneys in its pos-

session, and showed to the Court that all the money in the hands or possession of the defendant was derived by it from the operation of its railroad and other property mentioned in the bill, and was its income and the income of the property, and that it had no moneys whatever save such as were thus derived and received; and thereupon moved the Court to strike from the order or decree so much thereof as required or directed the defendant to deliver to the Receiver its money on hand (Record, p. 41). The Court took this motion under advisement, authorizing the Receiver in the meantime to take and the defendant to deliver the moneys in its possession derived from the operation of the mortgaged property, the same to be held by the Receiver subject to the order of the Court, and to be repaid to the defendant should the Court so adjudge (Record, p. 42).

On July 15, 1884, the defendant's motion to modify the order of the Court appointing the Receiver, by striking therefrom so much thereof as required the defendant to pay over to the Receiver its moneys on hand and the moneys derived from the income and earnings of the road on hand at the date of the order, and to require the Receiver to pay over to the defendant such moneys, was granted; and it was ordered that the sum of $32,216.20, paid over by the defendant to the Receiver under the order of April 18th, should be repaid by the Receiver to the defendant (Record, p. 46).

From this order the trustees in open court prayed an appeal to this Court, which was allowed, the Court directing the Receiver not to pay the fund to the defendant until the lapse of the time allowed by law for the filing by the trustees of a *supersedeas* bond (Record, p. 46).

It appears by a stipulation between the parties (second addition to Record, p. 10, opinion of the CIRCUIT JUDGE, pp. 3, 7), that:

"At the time the order was made herein on the 27th day of March, 1884, giving time for filing briefs, the the defendant had on hand in money $42,123.68, and had between that time and the time of the appointment of the Receiver paid out $46,458.16, leaving in its hands when the Receiver was appointed $32,216.20 on striking balance of receipts from operating the road and payments made by the company, as stated in the opinion delivered in the cause by the Circuit Judge."

The bill in this suit was not filed until the lapse of more than a year and a half from the date of default under the General Mortgage. During this time the complainants as trustees of this mortgage had made no demand for possession and had taken no proceedings in the enforcement of the trust, and at the time of the appointment of the Receiver the Railroad Company was in possession of its property and operating it.

Provisions of the General Mortgage.

The property covered by the General Mortgage included the following:

"And also all the rents, issues, tolls, profits, re-
" ceipts, moneys, rights, benefits and advantages had
" received or derived by the said railroad company from
" its railroad or other property, or in any other way
" whatsoever, &c." (Record p. 77).

Then follow these provisions:

"Provided, however, that this conveyance is upon the conditions following, to wit:

"FIRST. That so long as the said party of the first

part shall not make default in the payment or either principal or interest on any of the aforesaid bonds and coupons, as the same may respectively become due and payable, and shall faithfully perform the conditions of said bonds, and the stipulations and conditions of this indenture, said party of the first part shall be entitled to retain the possession of the railroad and other property hereby conveyed, and receive and enjoy the income thereof.

"FIFTH. In case default for the space of sixty days shall be made in the payment of any of said interest coupons, or of the principal sum of any of said bonds, as they shall respectively fall due, the said party of the second part, their successor or successors, and his or their survivor or survivors, on the written request of one-third, in interest, of the holders of said bonds, by themselves or by their agent thereto duly authorized, either of said trustees being competent to act as the agent of the other trustees, upon being furnished with funds for expenses and being suitably indemnified against risk and loss, may and shall enter in and upon, and take possession of and operate all and singular the said railroad and all the other property, real, personal, or mixed, hereinbefore conveyed or intended to be conveyed, and take and receive the income and profits thereof; and may and shall sell all and singular, said railroad and lands and all other property, real, personal or mixed, with all the charters, rights, privileges, immunities, franchises and choses in action of said railroad company, party of the first part, hereinbefore conveyed, or intended to be conveyed, and execute and deliver to the purchaser or purchasers, deeds and conveyances which shall vest in such purchaser or purchasers all the estate, right, title and interest, whether legal or equitable, of said party of the second part, and of said railroad company, party of the first part, in fee simple, absolute, free of equity, or redemption of, in or to said railroad, lands, property charters, rights, privileges and franchises, and every part and parcel thereof, and said deeds and conveyances shall forever bar and estop said railroad company, party of the first part.

"And the proceeds of such sale, if made for cash, after paying the costs, charges and expenses of said party of the second part, or their successors, and of their or his agents, or attorneys at law, or in fact, incurred in and about the said trust, and the said fore-

closure, sale and conveyance shall be distributed *pro rata* to the holders of the bonds without regard to priority of issue, and coupons secured by this trust, but neither in the case of a sale for money, nor in the case of any other sale, judicial or otherwise, shall any of the coupons or interest warrants from said bonds be entitled to or share any of the proceeds of such sale, unless the same are held and owned by the actual holders and owners of the bonds to which said coupons were respectively attached at the issue of said bonds. And it is expressly agreed that such coupons as may be held by any other person than the actual owner or holder of the bonds to which they were respectively originally attached, shall be considered merely as an unsecured promissory note of said railroad company, and shall not be entitled to the security of this deed of trust."

ARGUMENT.

The question which this part of the record presents is the question of title as between the mortgagor and mortgagee—as between the Railroad Company and the Receiver—to moneys in the possession of the company, at the time of the appointment of the Receiver, derived by the company from antecedent operations of its railroad and property. If the Court below rightly adjudged the title to this antecedently acquired income to be in the Railroad Company, we need not, for obvious reasons, inquire into the propriety of the order requiring its repayment to the company. That order followed as a moral and legal sequence of the decision upon the title.

The Court below thus stated the question involved in this appeal :

" This, therefore, is the question presented : Could the mortgagor, having in his possession unexpended earnings of the mortgaged property, be compelled to

turn those earnings over for the benefit of the mortgagee";

and thus stated the general proposition of law upon the subject:

"When a mortgagee allows a mortgagor to remain in possession after default, the latter takes the rents and profits to his own use, and the former cannot require him to account therefor nor recover them from him. * * * Although the mortgagee may have the right to take possession upon a breach of the condition, if he does not exercise the right he cannot claim the profits."

That the propositions of law, as stated by the *Circuit Judge*, are familiar and well settled, it is scarcely necessary to suggest. The consideration of these questions by the courts has been so fruitful in judicial statement and reiteration of the doctrine repeated by the Court below, that we believe we can better aid this Court by a simple collection of adjudged cases than by any elaboration of argument.

AUTHORITIES AND ADJUDGED CASES UPON THESE GENERAL PROPOSITIONS.

Text Books:

The rule is stated by the text writers in substantially the same language as that used by the Court below.

See

Jones on Mortgages, §§ 670, 771.
1 Hilliard on Mortgages, 179–222, *passim.*
2 Washburne on Real Property, p. 156, Par. II.

The application of the rule to railroad mortgages is thus stated in *Jones on Railroad Securities*, § 114:

" The earnings of a railroad, while it is allowed to remain in the possession of the mortgagor, are not subject to the lien of the mortgage, *although in terms the mortgage covers the tolls of the road, if at the same time the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession.*"

English Cases:

The English cases repeat the rule as laid down by Lord Chancellor HARDWICKE, in *Higgins vs. York Printing Company*, 2 Atkyns, 107, and by Lord MANSFIELD, in Chinnery vs. Black, 3 Doug., 391. Their language is quoted by this Court in the case of Gilman vs. Ill. & Miss. Tel. Co., 91 U. S., 615 (*post*, p. 16), and by PARKER, C. J., in the case of Wilder vs. Houghton, 1 Pick., 87 (*post*, p. 11).

American Cases in the State Courts:

In the case of Noyes vs. Rich, 52 Maine, 115, the defendant, who was superintendent of a railroad, had money in his hands " which had accrued by operating the railroad," and which he refused to deliver to a Receiver appointed in a suit brought by trustees of a mortgage executed by the Railroad Company. In this action the Receiver sought to recover these moneys. It was held that he could not recover, the Court saying:

" The suit of Mason and others [in which the Receiver was appointed, reported page 83 of same volume] is not a general creditor's bill, though analogous to one. They bring it not in behalf of all the creditors of the corporation, but in behalf of certain specified creditors. Nor does it seek to reach all the property of the corporation, but certain specified property mortgaged in trust for their benefit by a deed to Myers dated Feb. 6, 1851, The right of the plaintiff cannot extend beyond the

property mortgaged, *and the right of the Receiver must necessarily have the same limitation.* * * * It will hardly be contended that while mortgagors remain in possession they can be compelled to pay the rents and profits of the property to the mortgagees. And yet that is just what is attempted in the case at bar. No one has ever rightfully taken possession under the mortgage until it was done by the Receiver in March, 1860. *The money in the defendant's hands accrued from the earnings of the road prior to that time. The mortgage did not attach to it. Therefore it was not embraced in the subject matter of the suit in equity, and the Receiver was not entitled to it.*"

In Wilder vs. Houghton, 1 Pick., 87, the facts sufficiently appear in the opinion of the Court, delivered by PARKER, C. J.:

"The object of this suit is to recover of the assignee of a mortgagor the value of the rents and profits of the land mortgaged, from the commencement of the action to foreclose, brought by the present plaintiff, the mortgagee, to the time of possession taken in virtue of the writ of possession.

"The defendant stands in the place of the mortgagor, so that the * * * question submitted is the same as if the present action were between the mortgagor and the mortgagee; and in this view it must be considered an experiment, no such action having hitherto been brought, either in this country or in England, as far as we can discover from the books which have been referred to, or others which have been examined.

* * * * * *

"It is true that when the estate mortgaged is not full security for the debt, the profits would be useful to the mortgagee as a means of payment; but to obtain them he should enter early, or bring his writ of entry, which he may do immediately upon the execution of the deed; if he chooses to lie by and suffer the mortgagor to keep possession, he consents that the intermediate profits may be received by him and held without account. Though this question does not seem to have been brought directly before the Court, yet there are cases in which the principle has been considered, and it seems always to have been taken for granted that such a claim

as this cannot be maintained. Thus Lord HARDWICKE, in the case of Mead vs. Lord Orrery, 3 Atk., 244, says: 'As to the mortgagor I do not know any instance where he keeps in possession that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get possession.' The same eminent judge, in another case, *Higgins vs. The York Buildings Co., 2 Atk., 107*, says: 'In case of a mortgagee where a mortgagor is left in possession, upon a bill brought by the mortgagee for an account in this Court, he never can have a decree for an account of the rents and profits from the mortgagor for any of the years back during the possession of the mortgagor.' And in Doug., 21, Lord MANSFIELD says: 'The mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will.' And if this be the law in regard to the mortgagor, the same holds in regard to his lessee or assignee, as was settled in a case reported in 15 Mass. Rep., 274 (*Fitchburgh Cotton Manufacturing Co. vs. Melven*); in which case, also, is recognized the law as above laid down.'"

In M. V. R. R. Co. vs. U. S. Ex. Co., 81 Ill., 534, the Court said:

"Appellant having mortgaged its property and income to secure the payment of certain indebtedness, the question is, whether its earnings, after the execution of the mortgage and before foreclosure proceedings are instituted or possession is taken by the trustees, can be reached by other creditors. The mortgage conveys to the trustees the 'rights, powers, franchises, emoluments, *income* and property.'"

(The Court stated the provision of the mortgage by which mortgagor was entitled to possession until default, and by which also upon default the trustees were entitled to enter, and continued):

"From the language of the mortgage which we have quoted, we are unable to discover an intention to vest a right to the income to the trustees, until default in the condition and possession taken by the trustees on account thereof. In that event they are to receive the tolls, freights, income, rents, issues and profits, but until then these are to be received by the mortgagor. It

is true that it is its duty to apply the income, after the payment of current expenses, including necessary repairs and improvements, to the liquidation of the interest due upon its bonds, but this obligation, of its own force, no more carries the title to the particular money received as income to the bondholders or trustees than does the obligation to pay a debt in ordinary cases carry title to the creditors of the money in the debtors' pocket. The fact that the mortgagor is in possession, operating the road, renders it indispensable that it shall pay current expenses, and for necessary repairs and improvements, and that it shall exercise its judgment and discretion as to the extent repairs and improvements shall be made, and this can only be paid out of income. It is inconsistent with such control over the income that it shall be the property of the trustees."

The foregoing extracts fairly present the doctrine as it has been uniformly adopted and applied by the State Courts.

The following cases apply the rule :

Boston Bank vs. Reid, 8 Pick., 461.
Long vs. Wade, 70 Maine, 358.
Field vs. Swan, 10 Metc., 112.
Chase vs. Palmer, 25 Maine, 341.
Smith vs. Eastern R. R., 124 Mass., 154.
Ellis vs. B. H. & E. R. R., 107 Mass., 1.
City of Bath vs. Miller, 51 Maine, 341.
Williamson vs. N. A. R. R., 1 Biss., 198.
De Graeff vs. St. Paul & Pac. R. R., 24 Minn., 452.
Merchants' Bk. vs. Petersburgh R. R., 34 Leg. Int., 240.

Cases in this Court:

In the case of *Galveston R. R. vs. Cowdrey*, 11 Wall., 482, the salient facts were these: A railroad company had conveyed its property to trustees under

three successive mortgages. The first included "tolls, issues and profits." It provided for retention of the mortgaged property by the mortgagor until default for three months, and that upon such continued default the trustees should, on request of any bondholder, take possession. Subsequently to the execution of these mortgages the property was sold under executions issued upon judgments obtained by floating debt holders, and the purchasers entered into possession of the property and its income. Bills for the foreclosure of the mortgages were afterwards filed, and the mortgagees claimed to recover the income or the property in which it was invested. Their claim was denied, this Court, through MR. JUSTICE BRADLEY, saying:

"The complainants have also appealed from the decree because it fails to award them the tolls, income and profits of the railroad during the time it was operated by the present defendants, and to make the defendants accountable therefor. The complainants claim that nearly all the rolling stock and property, including the Junction railroad, claimed by the defendants as their property, were really produced by the earnings of the railroad fraudulently appropriated to themselves by the defendants. This claim raises the question whether the mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagee. In this case it does not appear that the complainants or their trustees made any demand for tolls and income until they filed the present bill. The bill itself does not contain any allegation of such a demand. Now what is the language of the deed of trust? They convey, it is true, with the other premises, the tolls, income, issues and profits, whenever the company shall be in default of payment; but a subsequent clause provides that in case the company shall at any time, for the space of three months, be in default in respect to the payment of either interest or principal of said bonds when due and demanded, on request in writing of any of the holders of the bonds,

the trustees shall take possession of the railroad and other property, and through the agency of the persons they may appoint, shall collect and receive the tolls, incomes and profits of 'the railroad and mortgaged property for the purpose of the security before declared, and may sell the road upon giving due notice,' &c. It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and income is to be practically carried into effect. At all events, until a regular demand were made for the payment of the tolls and income, we do not think, under the language of the deed, that the defendants were bound to account therefor. If this be so, it matters not what bargains the defendants made between themselves as to the disposition of the said tolls and income."

In the case of the *American Bridge Company against Heidlebach*, 94 U. S., 798, the controversy was between a judgment creditor who filed a bill in equity claiming *pro rata* payment out of certain money and proceeds in the hands of the company, and the mortgagees of the company secured by a mortgage pledging "rents, issue and profits," and containing a provision that if the interest were in default for six months, the trustees, upon written request of the holders of one-half of the outstanding bonds, might take possession of and operate the bridge, &c. The trustees filed their bill on the 25th of November, 1874. The bill of the judgment creditor was filed on the 11th of the following month. This Court, by Mr. Justice SWAYNE, said:

"In this case, upon the default which occurred, the mortgagee had the option to take personal possession of the mortgaged premises, or to file a bill, have a Receiver appointed and possession delivered to him. In either case the income would thereafter have been theirs. Until one or the other was done, the mortgagor, as Lord Mansfield said in Chinnery vs. Black, 3 Doug., 391, was 'owner to all the world and entitled to all the profit made.'

"The mortgage could have no retrospective effect as

to previous income and earnings. The bill of the trustees does not affect the rights of the parties. It is an attempt to extend the mortgage to what it cannot be made to reach. Such a proceeding does not create any new right. It can only enforce those which exist already. The bill of the trustees is as ineffectual as if the fund were any other property, real, personal or mixed, acquired by the mortgagee *aliunde*, and never within the scope of the mortgage."

In the case of *Gilman et al. vs. Ill. & Miss. Tel. Co.* 91 U. S., 615, the facts were these: The Des Moines Valley R. R. Co. had, in 1857, executed to trustees a mortgage covering its railroad, property and franchises, and specifically including "*the tolls, rents and profits* to be had, gained or levied therefrom." A second mortgage was executed by the company in 1868, which covered the road and its appurtenances and included "also all *rents, issues, tolls, profits,* CURRENCY, MONEYS, *rights,* benefits and advantages derived or to be derived, had or received therefrom by said company in any way whatever." In July, 1872, the interest on both mortgages being in default, the trustees of the second mortgage began a foreclosure suit in a State Court, making parties the Railroad Company, the trustees of the first mortgage and several judgment creditors, the Illinois and Mississippi Telegraph Company being among the latter. The trustees never took possession, nor was any Receiver appointed. A decree of foreclosure was made on the 31st of May, 1873, and the Court held that the lien of the Telegraph Company's judgment was subject to the mortgages. The Telegraph Company's judgment was obtained on the 24th day of May, 1872. On the 13th of June, 1873, execution was issued upon the judgment of the Telegraph Company,

and under a State statute it garnished moneys in the hands of the agents of the Railroad Company. A bill to enjoin the proceedings of the Telegraph Company under its judgment was filed jointly by the trustees of both mortgages. The opinion of this Court, delivered by MR. JUSTICE SWAYNE, is as follows, in so far as it affects the question under consideration here:

"The proceedings in this case at law having been held valid, the telegraph company is entitled to the fund in controversy, unless the appellants have shown a better right to it."

* * * * * *

"It would have been competent for the Court *in limine*, upon proper showing, to appoint a Receiver and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently during the progress of the suit. When the final decree was made a Receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee.

"Nothing of the kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither during that period was in any wise affected by the action of the Court."

* * * * * *

"Nothing was done in the exercise of the right which the mortgages gave to the mortgagees to intervene and take possession. We may therefore lay out of view also both of these topics.

"This leaves nothing to be examined but the effect of the mortgages, irrespective of other considerations.

"A mortgagor of real estate is not liable for rent while in possession (2 Kent. Com., 172). He contracts to pay interest and not rent. In Chinnery vs. Black, 3 Doug., 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord MANSFIELD said: 'Until the mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profit made.' It is clearly implied in these

mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things the whole fund *belonged to the company*, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgage did not exist. *They in no wise affected it.* If the mortgagees were not satisfied they had the remedy in their own hands, and could at any moment invoke the aid of the law or interpose themselves without it."

It will be observed that in the *Gilman case* the execution and process of garnishment issued upon the Telegraph Company's judgment in June, 1873, *nearly a year after the foreclosure bill of the trustees was filed* (July, 1872). Obviously, therefore, the moneys garnished in the hands of the agent of the railroad company were a part of income (current receipts) acquired subsequently to the filing of the bill. There is, therefore, we submit, no room to question the absolute conclusiveness of the opinion in the *Gilman case* upon the case at bar.

An effort was made in argument for the trustees, in the Court below and again in this Court in opposing the motion to dismiss their appeal, to distinguish the present case from some of those which have been cited; and with this purpose it was suggested that in the case of *Gilman vs. Ill. & Miss. Telegraph Co. (supra)*, the claims of an intervening creditor were

held to be superior to those of the mortgagee for reasons which would not apply to the claims of the mortgagor. The reasoning leading to this conclusion has not been stated and we are unable to forecast the argument on this point which the ingenuity of counsel for the trustees may now devise; but it is enough to say, in reply to any argument which, by possibility, may be made in this respect, that in all such cases as the *Gilman case* the Courts have derived the rights of creditors through the right of the mortgagor. Thus, in the *Gilman case* the language is:

"In this condition of things the whole fund BELONGED TO THE COMPANY.

And in the *Heidelbach case*:

"*The mortgagor is owner to all the world, and entitled to all the profits made.* The bill of the trustees is as ineffectual as if the funds were any other property, real, personal or mixed, acquired by the mortgagor *aliunde*, and never within the scope of the mortgage."

The case of DeGraff vs. Thompson, 24 Minn., 452, (which we might almost submit in lieu of a brief upon this appeal) is as complete an answer to any argument the complainants may make in this particular, as it is an effectual refutation of any claim of theirs to the moneys in question. That case may be stated thus:

Plaintiffs brought their action in the district court for Ramsey County against the First Division of the St. Paul & Pacific Railroad Company, and summoned as garnishees Thompson, Rice and Kennedy, the mortgage trustees of the defendant's road. Thompson and Rice appeared and disclosed; but no service was had upon Kennedy, who was a non-resident, and did not at any time appear in the proceedings. It appeared from the disclosures that the garnishees took possession of the road as mortgage trustees, October 9th, 1876, and

that the company had on hand at that time, as prior earnings of the road, $157,618.04, of which $42,618.04 were in the hands of the treasurer of the company at St. Paul, and $115,000 were in the hands of the assistant treasurer in New York City.

The Court ordered that judgment be entered against the garnishees, so far only as the same might be enforced against the joint property of all, and the separate property of Thompson and Rice, for the sum of $18,186.34. From this order the garnishees appealed to this Court.

* * * * * *

"CORNELL, J.: Assuming that appellants, at the time they took possession of the road and franchises under the mortgages, had no legal right as mortgagees to take and appropriate any portion of the previously acquired earnings and income of the road then on hand without the consent or authority of the company, their liability as garnishees, in respect to the $42,618.04, would seem to follow from the facts indisputably evidenced by the disclosures.

* * * * * *

"Under the statute the right of garnishment is given to a contract creditor whenever it is properly made to appear that the garnishee is indebted to the debtor of the former, or has property, money or effects in his hands, or under his control, belonging to such debtor, exceeding in amount and value the sum fixed by statute (Gen. St., C. 66, Tit. 10, S. 147).

"Were appellants debtors of the defendant company, within the meaning of this statute, in respect to this sum of $42,618.04, at the time of the garnishment? The facts established by the disclosure, beyond any reasonable doubt, are that the appellants, as mortgage trustees, under three several mortgages, and solely by virtue of their authority thereunder, first took possession of the defendant company's railroad property, and the franchises therewith connected, on the 9th day of October, 1876, and thereafter operated and used the same as such trustees. At this time the company was, as it had theretofore been, in the actual possession and enjoyment of its said railroad and property, as the lawful owner, with J. P. Farley as its general manager, and J. Botsford as its treasurer; and there then remained in account upon the books of the company, which were then balanced, of unexpended income and earnings

theretofore acquired a balance of $42,618.04, which then belonged to the company and was in the hands of its said treasurer. When the trustees thus took possession, the said Farley thereupon became and thereafter continued to be the general manager of the trustees, and the said Botsford also became and continued their treasurer, and all their subsequent acts in reference to the company's funds then in the possession of its treasurer, and in respect to all moneys afterwards earned in operating the road, were done solely under the direction and authority of said trustees; and as their officer, acting solely as treasurer for said trustees, and by their order and that of their general manager; and without any direction or authority whatever from the company or any of its officers, the said Botsford, immediately upon the said trustees taking possession, turned over to them said moneys so in his hands belonging to the company, by transferring the same to the new account, which he as their treasurer then opened and afterwards kept, and which contained full entry of all their receipts and disbursements as trustees in connection with said road. The only ground upon which the trustees made any claim to the transfer of this money was their supposed legal right thereto as trustees, under the stipulations contained in the mortgages. * * *

" The garnishee summons was served on Rice and Thompson, November 20, 1876, at which time it does not definitely appear what balance remained, nor is it at all important, in the view of the case taken by the Court. Upon these facts, leaving out of sight for the present the voluntary payments of the debts of the company by the trustees, and their effect, if any, upon the latter's liability, it is clear, if the trustees had no rightful claim upon the money in question, under the mortgages, that they had no legal or equitable right to retain or use it for any purpose. Having acquired it through a mistake as to their legal rights, and having no right conscientiously to retain it, a cause of action at once accrued against them, in favor of the corporation defendant, for its amount, as for money had and received. Though there was no privity of contract between them founded upon any express agreement, there was a definite sum of money due from them to the defendant, *ex cequo et bono*, from which the law implies the privity and promise essential to the maintenance of

the action. Whenever one receives money which is the property of another, and which he is bound in natural justice and equity to refund to the rightful owner, an indebtedness arises in favor of the latter against the wrongful holder, upon which an action lies to recover the amount. (Cases cited.)

"Being thus indebted to the defendant in respect to this money, they could not discharge their obligation to pay it by voluntary assuming the payment of debts of like amount due to others from the corporation without its assent. No debtor can thus discharge his obligations to his creditor.

"This money or debt, then, was the subject of garnishment in favor of the plaintiffs as judgment creditors of the defendant company, unless the trustees had the legal right to take and hold the money by virtue of some lien thereon created by the mortgages. These mortgages are all alike in their provisions. Each covers the road and franchises, and also in terms includes 'the tolls, incomes, rents, issues, and profits,' as part of the mortgaged property. By the first article of each it is provided that, until default in payment of the principal or interest of the bonds secured thereby, the company shall be suffered and permitted 'to possess, manage and operate the road, and to take and use the rents, incomes, profits, tolls and issues thereof in the same manner, and with the same effect, as if the mortgage deed had never been made.'

"By the ninth article it is provided that, in case of default in the payment of interest for the period of six months, 'the trustees may enter into the possession of said railroad and mortgaged property and collect and receive all tolls, freights, incomes, rents, issues, profits of the same, and operate the road for the benefit of the bondholders.' By article second it is further stipulated, among other things, 'that all the current net earnings and income of the said railroads, after deducting current expenses, and after paying the interest on the bonds secured by the prior liens above mentioned, shall be appropriated and used, from time to time, if necessary, in payment of the interest on the bonds secured by this instrument.' With the exception of this last-recited stipulation, it is conceded that the mortgages in question, in all their essential provisions and conditions, are substantially like those passed upon by

the Supreme Court of the United States in Galveston R. Co. vs. Cowdrey, 11 Wall., 459; Gilman vs. Illinois & Mississippi Telegraph Co., 1 Otto, 603; and American Bridge Co. vs. Heidelbach, 4 Otto, 798. In each of these cases it was held that the mortgage did not attach or become a lien upon any portion of the earnings or income of the road accruing while the mortgagor continued in its possession, control and management, and that the mortgagees acquired no lien or right upon any portion of the income accruing prior to the time of their taking possession of the road, either personally or through the intervention of the Court, by a receiver, in the exercise of their option after default. The principal of these decisions is this: that whenever, by the terms of a mortgage upon this kind of property, either expressly or by implication, the right is reserved to a company mortgagor, who is general owner, to retain the possession and use of the mortgaged property, by operating the road, receiving the earnings, and applying them in its discretion towards defraying the operating expenses, such mortgagor must be regarded as the owner of all such earnings acquired during the continuance of its possession, and as invested with the absolute right of disposal as fully as any general owner of property enjoys. This right is wholly inconsistent with the existence of any specific lien under the mortgage in favor of the mortgage trustees.

"The principle, as applied to this class of mortgages, we deem eminently wise and beneficial, and the case now before us falls clearly within it."

Again, it was argued below in behalf of the trustees that the order of March 27th, 1884 (*ante*, p. 3; in which it was directed that, pending the consideration of the question of receivership and the filing of briefs, "defendant until further order herein hold the property mentioned in the bill herein, subject to the order of the Court"), operated to constitute the Board of Directors of the defendant company the Receiver of the Court, and to invest the mortgagees, through this fictitious sequestration, with constructive possession of

the property. And, in this line, it was further argued that as the company had on hand $42,123.68 when this order was made, and between that time and April 11th, the date of the appointment of the Receiver, had paid out $46,458.16, that the amount turned over to the Receiver (under the provisional order of April 18th, 1884) must have represented income accrued between the date of the constructive possession order (so to term it) and the date of the actual possession of the Receiver. This notion scarcely suggests a legitimate question for argument.

First. The Court below, construing its own order, denied the construction put upon it by the complainants, and pointed out that the moneys paid out by the Company between March 27th and the date of the Receiver's appointment *were paid out for operating expenses,* and hence to be charged against the earnings of the road during that time. The Court further suggested the obvious advantage of this action of the company to the mortgagee, saying:

> " In fact the mortgagee is benefited by the action of the company, for at the time the application was first made it had $46,000 on hand which it could have used as it saw fit, and which, to the amount of $14,000, it has expended in the payment of those debts, which, by the final order appointing the Receiver, were chargeable on the future earnings of the road, and to that extent postponed the mortgagees."

SECOND. Except by recital of the mortgage the bill of complaint mentions neither income or moneys—in no aspect is there any specific claim there made to *moneys on hand.* Therefore the order of March 27th cannot, by any supposed force to be attributed to its terms, be

supposed to constitute the directors Receivers of these moneys in behalf of the mortgagees.

THIRD. A test of the scope and operation of this order of March 27th, may be found in the question whether the directors of the company could have been held in contempt for application of the moneys of the company without first obtaining permission of the Court, to purposes other than the mortgage debt. Obviously, not. Moneys were properly applied to the payment of operating expenses, and no representative of the trustees cared to suggest that there was any legal or moral impropriety in this.

FOURTH. The claim of the trustees, upon this point, reduces itself to the absurd when it is considered that if the Court took the property on March 27th the inclusion of the moneys then on hand was wrongful, and the entire amount, $42,123.68 (instead of $32,216.23), measures the just claim of the company. The $14,000 expended by the company in the operation of the property after March 27th was in this view chargeable to the Court, and as against the receipts of the Court for the same period, and therefore the claim of the company, upon this theory, would necessarily be for $42,123.68, the sum of earnings acquired antecedently to the possession of the Court, on hand when possession was taken, and appropriated by the Court with the mortgaged property.

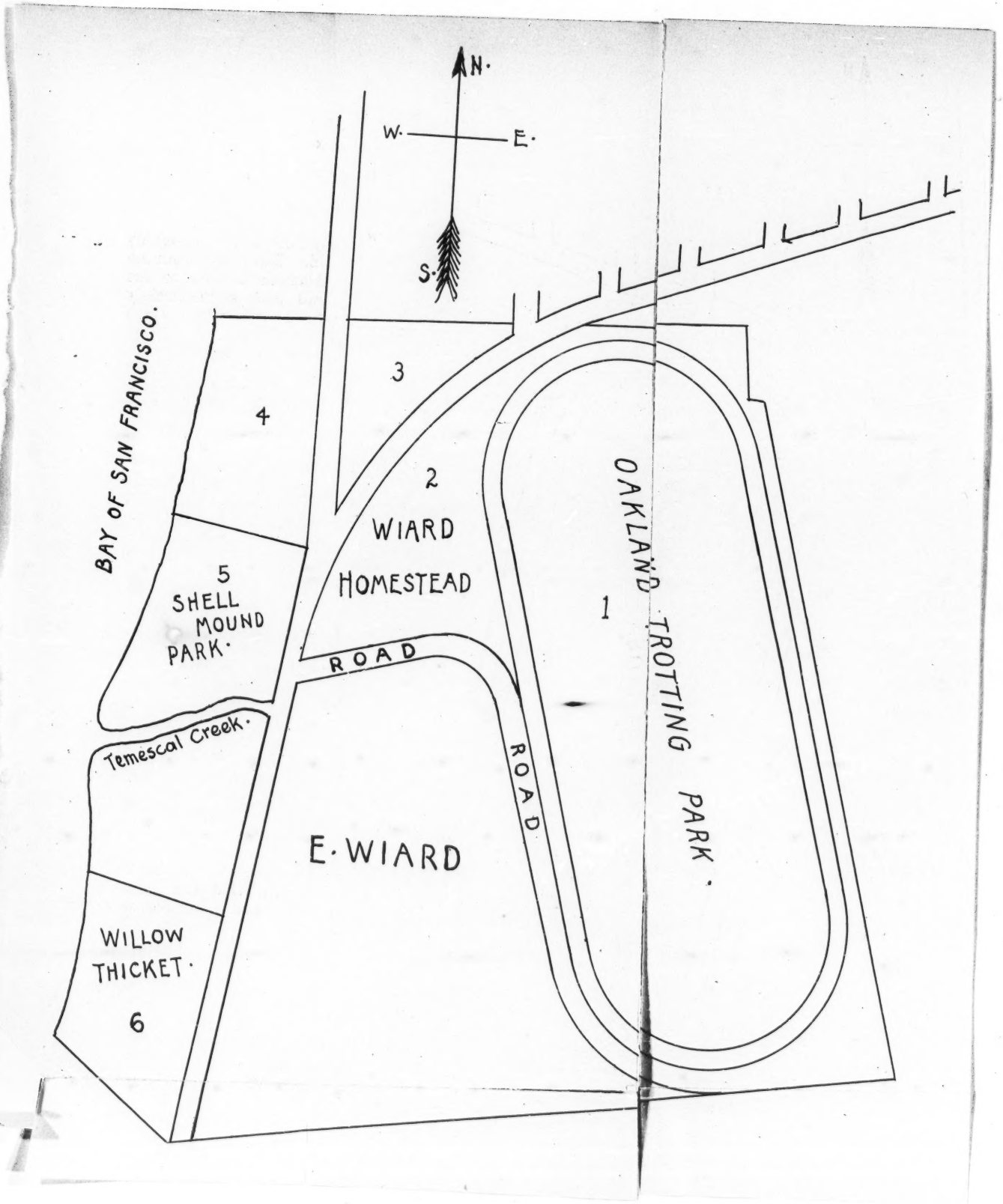
We think there is no reason to argue this question further.

The Appeal of the Railroad Company.

The Railroad Company appeals from the decree of July 22, 1884, directing that its property be turned over to the complainants, as trustees (Record, pp. 46, 47). We do not care to present a brief upon this appeal, as it is expected that the matters involved will be adjusted and disposed of by stipulation.

Wager Swayne,
Of Counsel for the R. R. Co.

Jan. 4, '88.—50.


N.
W.
E.
S.
BAY OF SAN FRANCISCO.
3
4
2
WIARD
HOMESTEAD
1
OAKLAND TROTTING PARK.
5
SHELL
MOUND
PARK.
ROAD
ROAD
Temescal Creek.
E. WIARD
WILLOW
THICKET.
6

MAP of
GREAT FALLS MANUFACTURING COMPANY'S LANDS
embracing part of the
TOWN of POTOMAC
in connection with the
POTOMAC RIVER AT THE GREAT FALLS.

Note { X.Y.Z. represents plan A. { and is present Dam.
X.U.V. " " B.
X.P.O.N. " " C.
X.U. " " 4.
X.Y. represents Dam as built

Note fact that X.Y. *constitutes part of plan* A. *and the Court held it substantially same as plan* 4.

MARYLAND.
VIRGINIA.
DISTRICT OF COLUMBIA.

Z. O. M. P. Y. U. X. V.

Connis Island
Chesapeake & Ohio Canal
Collins lock House
Boundary line of the Company's land
Canal
Ohio
Fairfax Street
Washington Street
Loudon Street
Madison Street
Washington Square
10th West Street
9th West Street
8th West Street
7th West Street
6th West Street
5th West Street
4th West Street
3rd West Street
2nd West Street
1st West Street